FEDERALISM IN NORTH AMERICA

A Comparative Study of Institutions in The United States and Canada

By

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Boston

The Chipman Law Publishing Company

1923

Printed in the United States of America

The Riverdale Press, Brookline, Boston, Mass.

PREFACE

The aim of the following essays is to interest the reader in the comparative study of the political principles which underlie the institutions of the United States and Canada. There is already an abundance of well-written books, some technical and others popular, describing in greater or less detail the constitution and government of both countries. The present volume does not seek to inform the reader of facts which he may easily find elsewhere, but rather to draw his attention, by a process of comparison, to the broad principles upon which the institutions of government in each country rest.

The comparative study of political science deserves far more attention than it has yet received. It is strangely neglected in our universities. All places of higher learning provide the student with the means of acquiring some knowledge of the political system under which he lives, but it is too often forgotten that such studies tend to encourage narrowness and provincialism of thought, unless the student is taught to balance his mind by the continual comparison of his own institutions with those of other countries. If we are to teach the science of government in a scientific and intelligent manner we cannot concentrate our whole attention upon a single example.

A few years spent in teaching law students at McGill have helped me to realize the extent to which even fairly well educated Canadian boys are ignorant of the institutions of the great country which they can actually see from the slopes of Mount Royal. I have reason to believe that the average American college student is equally ignorant of the principles of government prevailing in Canada. It is in such ignorance that much international misunderstanding is bred.

To bridge this gap between the students of the two countries is work which awaits a writer of more authority and learning than I can claim. In the meantime those of us who find an absorbing interest in the study of the two great experiments in democratic government which are being worked out on this continent will be well rewarded if we can induce others to explore more thoroughly the field of political science which is roughly surveyed in the chapters that follow.

The reader will observe that no references to authorities are given except in order to identify quotations or in cases where courtesy demands a special acknowledgment. The subjects lightly touched upon in this little book range over such a wide field that I was really faced with the alternatives of either giving a very elaborate apparatus of references or of omitting them altogether. Since my purpose has been rather to suggest ideas than to give information, I have thought it better to avoid disfiguring the

pages with a great mass of footnotes, but this does not mean that I expect the reader to take any statement upon trust, and I only hope that he may be sufficiently interested to follow up the ideas suggested here by further investigation of his own. For the convenience of such readers as are neither compelled nor inclined to make a more detailed study of the subject I have inserted the chief constitutional documents in the appendices. College students and those who are further interested will readily obtain the guidance necessary for more detailed study from their teachers or from library authorities. I sympathize greatly with the desire of the average college student to make use of any available short cut to knowledge, but if any student fails in an examination through believing anything that is written in this book I wish him to realize that he has only himself to blame.

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McGill University, Montreal.
26th December, 1922.

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CHAPTER I

THE FEDERAL IDEA

The average visitor from Europe who makes a summer tour through the United States and Canada notices but little difference between the two countries when he crosses the frontier at Niagara or elsewhere. Except in passing to or from the Province of Quebec, where the French tradition combines with a recent amendment of the United States Constitution to emphasize the importance of the boundary, the traveler finds that language, customs, and social conventions are practically the same on each side of the line. If he gives a passing thought to political institutions he knows vaguely that both countries are governed on a federal basis, and he generally assumes that the two federations are more or less similar in principle.

This notion, which is by no means confined to European visitors, is utterly at variance with the facts. The two systems of government are

profoundly dissimilar. They are the products of widely different historical conditions. Each constitution is based upon distinct theories of political science, and these theories find their expression in two widely different systems of organization. These differences are reproduced again in the political life and habits of the two peoples. To analyze and compare the principles underlying the institutions of the United States and Canada is the object of the following chapters.

Let it be said at once that this process of comparison does not require us to enter into judgment and to pronounce dogmatically that one political system is better than the other. Criticism of minor details may sometimes be profitable, but there is no absolute standard of excellence upon which a general judgment can be based. The constitution of each country is entirely a growth of the soil, created originally by the free act of the people and molded into its present form by their continued political experience. Each nation has much to learn from a sympathetic and unprejudiced comparison of its own institutions with those of its neighbor. On the other hand, for either people to attempt to reproduce as a whole the policy of the other would be an almost inconceivable act of folly. In the realm of political science the world has now considerable experience of two main types of error. One is that species of narrow-minded insularity, often miscalling itself conservatism or patriotism, which regards

every suggestion based on the study of other lands as a form of disloyalty and claims that all its own established institutions are above criticism. The other is the reckless passion for copying foreign examples without regard for the history and traditions of the country in which they are to be reproduced. From each of these follies we may pray to be delivered.

If I were asked to express in a word the basic principle of the Federal Constitution in the United States, I would reply in the first place that extreme conciseness is usually only to be obtained at the expense of accuracy. With this reservation I would go on to say that the fundamental principle is that of dualism.

Unless he happens to live in the District of Columbia or in one of the outlying dependencies, every resident of the United States is under the jurisdiction of two distinct governments, the federal government of the United States and the government of the state in which he is living at the moment. Subject to the limitations contained in the written Constitution, each of these two authorities is supreme within its own sphere. If either attempts to trespass upon the field reserved to the other, its action is a mere nullity and will be so declared by the courts. Each government is equipped with its own complete set of executive, legislative, and judicial machinery. The various executive departments are differentiated in accordance with the duties entrusted to each government by the Constitution. For example, there is no Secretary

for Education in the United States cabinet, since education is one of the matters reserved to the individual states. Similarly the state government does not require any department for the handling of external affairs. On the other hand, there are certain matters in which the two governments have concurrent powers, and in these there is a duplication of the political machinery. For example, the administration of justice is divided by the Constitution between the Union and the states. Each therefore has its own attorney-general, together with a complete and independent organization for executing the civil and criminal processes of the law.

If political institutions were constructed only by philosophers, working from abstract designs without reference to particular conditions, it is inconceivable that such a federation as that of the United States could ever have come into being. The theoretical objections to such a constitution are obvious, and grave practical inconveniences have developed in its actual working. Its adaptation to changing conditions has been accomplished with great political skill, but at the same time with much suffering and loss, which greater foresight might have avoided. No power of human draftsmanship could possibly frame a federal constitution so expressed as to eliminate all possibility of dispute between the rival authorities, and the American Constitution is probably the most intricate scheme of federation that has ever been devised. Hence it is not surprising to find that its true meaning

has been a never-failing source of controversy and litigation down to the present day. We can also appreciate the reasons which led the framers of the South African Constitution to cut off this great stream of litigation at its fount by definitely enacting that the provincial councils should in all matters be wholly subordinated to the Union Parliament.

If, however, we turn from theory to history, we see at once that the American people could never have been united under any form of government that did not rest upon a dualistic basis. The Constitution as it stands represents the maximum of the concessions which Hamilton and his friends were able to wring from the opponents of federation. As subsequently interpreted by Marshall in the Supreme Court it represents a good deal more, and President Van Buren was undoubtedly right when he said that the people would never have consented to the Constitution if they could have foreseen the interpretations which Marshall would place upon its language.

The problem which faced Washington and Hamilton was the difficulty of inducing the American people to accept any form of federation which would result in a genuine union. It was obvious to the more sober-minded statesmen of the time, as it is obvious to everyone to-day, that no scheme of any kind could produce a real national unity unless the states were prepared to surrender to the national government some of the essential attributes of their separate

independence. Nevertheless it was precisely this surrender which the less well-informed opinion of the day was unwilling to make. For us at the present time it is difficult to realize the intensity of the passion with which the petty commonwealths of 1787 clung to a local independence that was productive of nothing but internal disorder, commercial chaos, and the contempt of foreign nations. Their obstinacy is all the more surprising, since the experiment of a partial union, involving no real surrender of state sovereignty, had already been tried with disastrous results. The Constitution as we now know it was the second attempt at organizing the United States. By the "Articles of Confederation and Perpetual Union," drawn up in 1781, during the war with England, it was declared that

> "The said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever."

The cardinal difference between this scheme and the permanent Constitution was that under the former the central government was given no direct authority over the individual citizens. The only units upon which it could act were the thirteen states, and the powers reserved to the states were so large that the federal Congress

was little more than a consultative body. It did not even possess the power of raising money, except by asking for it from the states. So long as the war lasted, the bond of necessity held together the ill-framed structure, though at a grievous cost in military efficiency and men's lives. With the return of peace the central government rapidly crumbled to pieces. It could neither maintain authority within its own borders nor honor its own engagements with foreign powers. The Constitution of 1787 came as the remedy for a state of things which Washington himself described as no better than anarchy.

When we realize the tenacity with which American opinion clung to the idea of sectional independence we shall readily understand how the Federal Constitution could only have been framed on the principle of dualism. The theory of state sovereignty had to be preserved, in name at least. Nothing could be conceded to the central government beyond the bare minimum of powers which bitter experience had shown to be necessary to its very existence. Every particle of power surrendered by the states was given grudgingly, and the enemies of federation hoped with some show of reason that the new scheme might soon prove itself unequal to the actual work of government. In this they were disappointed, and their defeat is largely due to the destiny which, at a most critical period of the nation's history, chose John Marshall to preside over the struggling Supreme

Court of the United States, a tribunal the future of which its first chief justice could only contemplate with despair.

In so far as it can be stated in a few words, the political theory underlying the Constitution of the United States is somewhat as follows:

Thirteen independent and sovereign states or nations met together, and entered into an agreement to surrender specified portions of their sovereign power to a new entity, deriving its existence and authority from the American people as a whole and its legal powers from the grant of the several states. These powers must be found in the written text of the grant either in express words or by necessary implication. To make this quite clear the Tenth Amendment (1791) provided that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

Before we proceed to examine how far this theory has found expression in the actual institutions of government, let us try to ascertain the corresponding principle, if there be one, upon which the federation of Canada is based.

In the first place we should understand that the historical conditions under which the Dominion of Canada was formed did not call for any authoritative dogmatic statement of the political theory underlying the new federation. It was not necessary to say more than that the Constitution should be "similar in principle to that of the United Kingdom."

The members of the Philadelphia Convention were faced with the problem of constructing a new sovereign state. This new entity could only derive the powers necessary to its existence by coaxing them out of thirteen small states which were extremely unwilling to part with them. Hence it was necessary to make an accurate statement of the principle on which the new federal government was based, and the Tenth Amendment was added to the original document for this purpose.

The statesmen who met at Quebec to organize the Dominion of Canada were faced by no such problem. For them there could be no question of creating a new sovereign power. All parties at that time were agreed that the entire sovereignty over all the provinces and territories in British North America was vested for all purposes in the Imperial Parliament. The difficulties which have arisen in recent years concerning the international status of the British dominions had not then appeared upon the horizon of practical politics, though they had been foreseen by many of the conservative statesmen who had resisted the concession of "responsible government." Furthermore it should be noticed that the federation of Canada was effected immediately after the close of the Civil War in the United States. To Canadian statesmen the war appeared as an object lesson illustrating the dangers that might arise from rival claims to sovereignty, and they were determined that there should be no question in

Canada as to the political supremacy of the federal power.

The existence of a single sovereign power being thus generally conceded, the task before the Quebec Conference was limited, so far as questions of political principle were concerned, to organizing a federal machinery through which that sovereignty might operate. Let it not be thought that the problem of Canadian federation was simple or free from controversy. The opposition to union was vigorous and formidable, but it was based upon the racial and sectional jealousies of different groups, and not upon divergent views as to the nature of a federal government.

The underlying theory of Canadian federalism may therefore be summarized by saying that a single political power distributes its energy through two groups of institutions, some national and others provincial. In legal and political phraseology this central source of power is commonly referred to as "the Crown," a word which is unfortunately used in more senses than one. For our present purpose it may be taken to mean that single national authority of which the king was formerly the wielder and is still the symbol. In discussing imperial relations we speak of "the Crown," as a symbol of the bonds, sentimental rather than legal, uniting the vague organization which has been long known as the "British Empire," but is now sometimes called the "British Commonwealth of Nations." Within Canada it means the

single power which expresses itself through all the organs, both federal and provincial, of Canadian government. If the kingship should ever disappear from our institutions we should probably replace the term by some such phrase as "the people" or "the nation."

Canadian federalism is therefore founded upon the unitary principle, as distinguished from the principle of dualism. In the following chapters we shall trace by comparison the working out of these two ideas in the institutions of the United States and Canada. For the present a few illustrations may suffice to make our meaning clear.

For example, every American state has its own criminal law. In addition there is a considerable body of federal statutes defining and penalizing offenses relating to matters within the federal jurisdiction. The machinery, judicial and executive, for administering these two bodies of law is completely duplicated throughout the whole area of the United States. The criminal is arrested, prosecuted, tried, punished, and pardoned by officers who act under either federal or state authority, but never under both. If he escapes into another state he can only be brought back by a process resembling that of international extradition.

In Canada the criminal law is contained in a Dominion Code, the competence of the provincial legislatures being limited to creating penalties for the violation of statutes relating to matters of local order, such as the control of

street traffic. At the same time all the executive officers of the provinces, no less than those appointed by the Dominion government, are charged with the duty of enforcing the federal law. In most cases the provincial police arrest the offender, and the provincial attorney-general arranges for his prosecution. If he escapes into another province he can still be arrested upon the original warrant, when it has been endorsed by a local magistrate. He is tried before a judge sitting under the governor-general's commission, and sentenced to imprisonment either in a provincial jail or in a federal penitentiary, according to the gravity of his offense. If he is sentenced to death it is the duty of the province to execute the sentence. On the other hand the power of pardon or of mitigation rests with the government of the Dominion.

In other words the American conception is that of two sovereign authorities dividing between themselves the various fields of political activity, while Canada proceeds upon the theory of a single sovereign power expressing itself through different agencies, some national and others provincial.

One important result of these divergent doctrines may conveniently be noted here. Since it is impossible to draft the text of any constitution so as to provide in detail for every conceivable case, it becomes necessary to decide in what authority the general residue of unspecified powers is to be vested. The two theories

result quite logically in different conclusions. Under the American doctrine the giver keeps for himself whatever he does not choose to give away. Consequently we find that all powers which are not granted to the federal government either by express words or by necessary implication are reserved to the states or to the people, and the Tenth Amendment lays this down in precise terms. In Canada there is no question of competing sovereignties, but only a distribution of functions between the more important government of the Dominion and the less important governments of the provinces. From this it naturally follows that the general reserve of undefined powers remains with the more important authority, and this is expressly declared by section 91 of the British North America Act, which empowers the Dominion Parliament

> "To make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

Again, it should be observed that the American Constitution carefully safeguards the independence of the states in regard to all matters not committed to the federal power. The central government has no right to control the action of a state in any matter of state competence. In the Canadian scheme, on the other hand, there are several provisions which make it quite clear that the provinces, as political entities,

are of inferior rank to the Dominion. For example, the lieutenant-governor of a province is an officer appointed by the Dominion government, which has the right of dismissing him for cause assigned. Since the office of lieutenant-governor has become in modern times little more than a sinecure, this provision is no longer of any great practical importance; but the right has been actually exercised in a couple of cases and serves to illustrate the view which our Constitution takes of the relation between the two governments. To take another instance, the federal cabinet has the right to disallow any provincial legislation which it considers to be injurious to the general interests of the Dominion, although the statute in question may be entirely within the legal competence of the provincial legislature. This power again has been very sparingly used, but it has been exercised with advantage in certain cases where imprudent local legislation threatened to create difficulties with foreign nations. The United States Constitution, resting as it does upon a different political theory, contains no similar provision for controlling the action of individual states in the interests of the country as a whole.

It remains to ask how far the principles upon which the two federations were founded are still operative at the present day. Changes in legal forms never keep pace with the movements of political thought, and it often happens, as in the case of the British Constitution, that a political revolution may gradually be effected without

any great changes in the text of the law, it being tacitly agreed that the new ideas are to find their expression through the medium of the old formulae. When we consider the tremendous changes which have taken place in the political thought of the whole world during the last century and a half, we shall not be surprised to find that they have profoundly influenced constitutional practice upon the continent of North America. The Constitution drawn up at Philadelphia is now the oldest in the world, and it has probably been less changed in fundamental matters than that of any other civilized country. Nevertheless, it has not stood still, and the spirit which animates it is no longer the same.

In the United States the outstanding change has been the disappearance of the old theory of state sovereignty as it was held in the eighteenth century. This change is not marked by the alteration of a single word in the text of the Constitution, but it is none the less real and far-reaching. In this development we may observe certain fairly definite periods.

The first period is that of the judicial interpretation of the Constitution by the Supreme Court. It may be taken as ending with the death in 1835 of John Marshall, who had presided over the Court since 1801. Under the influence of his powerful mind the ambiguities in the written text had been consistently construed with the object of investing the federal government with all the powers necessary to the maintenance of national unity. This process of

interpretation aroused violent opposition, and in more than one instance the decrees of the Supreme Court were met with open defiance on the part of individual states. Intellectually Marshall was in advance of his time, and his attitude did not obtain the sympathy of public opinion. The federalist party gradually weakened in popular support, and in 1829 President Jackson was swept into office on the top of a wave of "democratic" sentiment which demanded a vigorous reassertion of the doctrine of "State Rights." Jackson's attitude may be estimated by the reply which he gave to a petition from the unfortunate Cherokee Indians in 1832, informing them that "the President of the United States has no power to protect them against the laws of Georgia."

After the death of Marshall in 1835 the Supreme Court was gradually refilled by Jackson and his successors with judges unsympathetic towards the federalist view, and the State Rights theory dominated the internal politics of the United States down to the outbreak of the Civil War in 1861. This may be taken as the second period. In the field of constitutional law its chief landmark is the decision in the famous "Dred Scott Case" of 1857, where a majority of the Supreme Court ruled that Congress had no power to exclude slavery from the territories of the United States.

The most extreme assertion of the theory of state sovereignty is marked by the action of South Carolina in 1860, when she repealed the

ordinance by which she had ratified the Constitution and announced that she "resumed her sovereign place among the nations." Other Southern states quickly followed, and their action found its logical expression in the attack on Fort Sumter in April, 1861. The controversy then passed from the forum to the battlefield, and the victory of the North in 1865 decided, among other things, that the Constitution was an irrevocable pact creating a new nation, from which no state had the right to withdraw.

After emerging from the stormy years of the so-called "Reconstruction" the nation entered upon a period which may be taken as continuing to the present day. It is not marked by any sensational controversies concerning the nature of the federal system, but rather by the growth of a general acquiescence in the supremacy of the national government. Two changes that have been made in the text of the Constitution point in this direction. The Sixteenth Amendment (1913) was passed in order to set aside a certain legal decision and empowers Congress to levy a general income tax. The Eighteenth Amendment (1919) purports to prohibit the trade in intoxicating liquors and authorizes Congress, concurrently with the states, to legislate to that end. According to the general principles of the Constitution everything relating to what Americans call the "police power" should be exclusively a matter of state competence, and the Amendment clearly violates the symmetry of this principle. Logically

considered, a rule of this kind is out of place in a constitutional document, and its introduction is due to reasons unconnected with the principles of political science.

More important, however, than any alteration in the text of the law is the change in public sentiment. The doctrine of state sovereignty has never been repealed in the legal sense, but it is gradually fading into the background. It survives as a constitutional formula, but has ceased for most purposes to be a political reality, just as the legal powers nominally vested in the English king no longer correspond to his actual position in the government of the country. Public opinion acquiesces in the growing importance of such federal organizations as the Interstate Commerce Commission, the Bureau of Education, and the Labor Board. None of these have any more constitutional right to interfere with matters of state competence than they would have had a hundred years ago, but the general support of the nation has enabled them to engage in activities which would have been beyond the wildest dreams of the federalist party in the early years of the nineteenth century.

In only one modern instance has a state ventured upon even a half-hearted defiance of the Supreme Court. In 1915 the state of Virginia obtained a decree in the Supreme Court ordering West Virginia to pay a sum of over twelve million dollars, arising out of a debt contracted in 1861. For some years the defendant state

refused to comply with the judgment, maintaining that a sovereign state could not be compelled to pay its debts except by its own free will, a proposition which had been conceded even by Hamilton himself in 1788.[1] In 1918 the Supreme Court formally denied this contention and asserted the right of the federal power to compel a state to pay its debts. By what means the decision was to be enforced was not stated, and fortunately a solution of the problem became unnecessary, for at this point West Virginia capitulated to the pressure of public opinion and made arrangements for the levy of a tax to meet the judgment. Her withdrawal may be taken as the final surrender of the position successfully defended by Georgia, with the approval of President Jackson, in 1832. Not a word relevant to the controversy had been altered in the written text of the Constitution. The only change which had taken place was a change in the public opinion of the nation touching the nature of the United States.

In Canada there has been no such general change of sentiment with regard to the federal idea. For the reasons already given, no claims could ever have been advanced on behalf of the provinces similar to those maintained by some of the American states. The inferiority of the provinces to the Dominion as political entities has never been seriously disputed, and could only be denied in disregard of the plain words

[1] See No. 81 of *The Federalist*.

of the Constitution. Of controversy and litigation upon the distribution of legislative powers there has been abundance, and the decisions of the Privy Council have tended on the whole to support the provincial claims. These discussions are of importance to the student of constitutional law, but they would be out of place in the present chapter, since they do not involve any fundamental difference of opinion as to the principle underlying Canadian federation.

There is one feature of Canadian federalism which should be noted here, since there is nothing corresponding to it in the United States. In part the Canadian scheme was, like the American, an agreement between political units or colonies. But it had this further element, that it was also, in substance if not in form, a treaty between two races. Of this important historical fact there is comparatively little indication in the text of the British North America Act. It appears in section 133, which makes the English and French languages of equal authority in the Province of Quebec and in the proceedings and acts of the Dominion Parliament. It appears also in section 93, which aims at preventing the provinces from showing any discrimination between Protestants and Roman Catholics in the matter of education. Otherwise there is nothing in the Act to indicate the tremendous importance of the racial question in Canada.

Both in the Dominion and in the provinces it is necessary for prudent statesmen to bear in

mind that the Canadian Constitution has in some measure the quality of a treaty. In practice this acts as an important restriction upon legislative powers. For example, the Dominion has never exercised its legal right to pass a general statute regulating the law of marriage and divorce. There have been occasions when a purely parliamentary majority for such a measure might have been obtained, but no legislation on this subject could easily be devised which would meet with the joint consent of the two chief racial elements in Canada. The same problem, intensified as it is by religious differences, has also aggravated the difficulty of dealing with public education in the provincial legislatures, and has led to widely different solutions of the educational question in different provinces. So again the Dominion has an undoubted legal power to legislate generally upon the liquor question, but it has only exercised this power to the extent of providing for a certain measure of local and provincial option.

Fortunately all Canadian statesmen of the better class have recognized the necessity of respecting the historic traditions of the different sections of the nation, and have refrained from trying to force upon the country a greater uniformity of institutions than it is prepared to bear. Except among certain sectarian propagandists of a low type, it is generally recognized that the diverse elements of our people can only make their best contribution to the common life of Canada so long as they are permitted to

develop freely according to their own traditions and under their accustomed laws. We may therefore take it as a feature of Canadian federalism that it rests upon the recognition of two racial elements in the same nation, differing in language, tradition, and institutions. Considerations of honor and of policy demand that these differences should be respected in all the activities of government, even where the letter of the law permits liberty of action.

In conclusion, the student should observe the provision which each country has made for the alteration of its constitution. In the United States, since the whole federal system rests upon the joint grant of the people and of the several states, every demand for alteration must be referred back to that final source of authority. The procedure for carrying any proposed change into effect is elaborate and complicated, and has been made so with the deliberate intention of discouraging hasty or ill-considered alterations.

The British North America Act contains no provision for its own alteration by any authority within Canada. In this it differs from the constitutions of Australia (1900) and South Africa (1909), the reason for the difference lying in the rapid growth of the sentiment of Dominion autonomy in the course of the period that had elapsed since 1867. When Canada was federated, no one disputed that the Dominion was definitely inferior to and dependent on the Imperial Parliament. The statesmen of the

Quebec Conference never claimed for her the position of a "co-equal member of the community of nations forming the British Commonwealth of Nations," if we may venture to borrow a definition from the Constitution of the Irish Free State.

The Constitution of Canada, therefore, can only be altered by a statute of the Imperial Parliament. In practice this creates little difficulty, for the government in London is always ready to put through any change which the Canadian government formally requests. There is some controversy in Canada as to the advisability of obtaining powers similar to those possessed by the younger dominions. The chief opposition comes from Quebec, where there is a certain nervousness lest facility of alteration might not endanger the special privileges secured to French Canada under the Quebec Act of 1774 and the Union of 1867. On the whole the matter does not excite much public interest, for the disability is felt to be more theoretical than practical. There is no doubt whatever that the power of alteration will be promptly conceded by the British Parliament if it is ever seriously demanded by Canada.

CHAPTER II

EXECUTIVE GOVERNMENT

The study of political science, if it be a science, is hampered by the lack of a technical vocabulary in which the words have fixed meanings familiar to all students. Our discussions turn round such words and phrases as "monarchy," democracy," "will of the people," and so on, all of which are continually being used in different senses, with the result that many of the debates on these matters are rendered futile by an initial misunderstanding.

A verbal difficulty of this kind makes us hesitate to describe the nature of the presidential office in the United States by the one word which most accurately defines it. In the strictest meaning of the term the federal government is a limited or constitutional monarchy, and the events of recent years have left it the only real monarchy of first-class importance in the civilized world. Unfortunately popular usage has now associated the meaning of the word "monarchy" exclusively with those governments in which the chief officer of state is chosen by the process of hereditary succession. For the purpose of serious political discussion the term has therefore become entirely useless, since it is

employed to describe such utterly different systems of government as those of modern Canada or Norway on the one hand, and pre-revolutionary Russia or Afghanistan on the other. In calling the federal government of the United States a monarchy I mean that the chief executive power is vested by traditional practice, as well as by law, in the person of one man. In saying that it is limited or constitutional I mean that the area over which the ruler can exercise his authority is marked out for him by the law and practice of the Constitution. But to use a word according to its derivation instead of accepting the popular usage exposes a writer to the charge of pedantry, and we must therefore content ourselves with regretting the lack of any term which conveniently describes the presidential office under the American Constitution.

It is this concentration of power in a single individual, a principle deliberately adopted by the Philadelphia Convention and unchanged to the present day, which is the outstanding difference between the executive government of the United States and that of Canada or Great Britain. The question was one of bitter controversy in the eighteenth century, and the views of those who opposed the principle have been summarized by Hamilton in a picturesque passage of *The Federalist* (No. 67), which is worth quoting here:

> "Here the writers against the Constitution seem to have taken pains to signalize their talent of

misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavored to enlist all their jealousies and apprehensions in opposition to the intended president of the United States; not merely as the embryo, but as the full-grown progeny, of that detested parent. To establish the pretended affinity, they have not scrupled to draw resources even from the regions of fiction. The authorities of a magistrate, in few instances greater, in some instances less, than those of a governor of New York, have been magnified into more than royal prerogatives. He has been decorated with attributes superior in dignity and splendor to those of a king of Great Britain. He has been shown to us with the diadem sparkling on his brow and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses, giving audience to the envoys of foreign potentates in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been taught to tremble at the terrific visages of murdering janizaries and to blush at the unveiled mysteries of a future seraglio."

Hamilton was perfectly right in contending that the republican chief magistrate was an officer of a very different kind from King George III. But he does not seem to have realized that the difference consists in the fact that an American president exercises in his own person vastly more power than has been enjoyed by any

English king since Henry VIII. In substance the opponents of the federal idea were perfectly right in their appreciation of the political character of the proposed executive. It is true that the diadem and the purple, the minions and the mistresses, have not become features of official ceremonial or of White House society, but this is due rather to the American tradition of dignified simplicity in public life and to the pressure of opinion upon the outward behavior of public men. The fact remains that the president is a potentate to whose discretion, sometimes uncontrolled and sometimes shared with the Senate, the framers of the Constitution thought it wise to entrust enormous powers.

The comparisons drawn in *The Federalist* between American and British institutions are largely vitiated by the difficulty which the Americans, like other foreign observers, found in understanding the wide divergence between the legal forms and the political realities of the British Constitution. For example, in No. 70, Hamilton says:

> "The king is not bound by the resolutions of his council, though they are answerable for the advice they give. He is the absolute master of his own conduct in the exercise of his office, and may observe or disregard the counsel given to him at his sole discretion."

This is a perfectly accurate statement of the abstract legal position, as Blackstone describes it. As a statement of the constitutional practice it was hopelessly wrong, even for the days

of George III and Lord North. American observers of the period were keen students of Blackstone, and they often made the mistake of taking him too literally. Blackstone's lectures had been delivered at Oxford to young men of the English governing class who understood perfectly well that their professor did not pretend to be describing the actual practice of government. He was concerned only with the formal legal theory. For example, no reader could ever gather from the pages of Blackstone that such a thing as the cabinet existed. Across the Atlantic this tacit understanding between him and his class was not always appreciated.

There is, however, no need to dwell upon Hamilton's very pardonable failure to understand the bewildering divergence between law and fact in the British Constitution. It is more interesting for us to notice that the two sentences just quoted from *The Federalist* in reference to the English king are a perfectly accurate statement of the president's relation to his cabinet in all matters except those where the law compels him to obtain the concurrence of Congress or the Senate. It is literally true to say that he is "the absolute master of his own conduct" and that he "may observe or disregard the counsel given to him at his sole discretion."

In the United States the accepted practice of government supports the president in the actual personal exercise of the powers vested in him by law. His relation to his cabinet is that of superior to subordinates. Subject to the approval

of the Senate, which is not usually refused, they are nominated by him at his absolute discretion and they hold office during his good pleasure, the consent of the Senate not being required for their dismissal. The law does not permit them to sit in either house of Congress, but with this limitation the president is absolutely at liberty to select whom he wills out of the whole nation, though for political reasons he usually picks them so far as possible from different states. The final responsibility for executive decisions rests with him alone. The duty of the cabinet is to do his bidding. The text of the Constitution authorizes the president to demand the written opinion of his ministers on matters relating to the affairs of their departments. But neither law nor constitutional practice requires him to follow this opinion. Within the field marked out for him by law he is an absolute ruler.

Furthermore it should be observed that the president is practically irremovable and also, within the limits of his legal powers, irresponsible. His term of office cannot be abridged without his own consent. The Constitution indeed provides that he can be attacked and removed by the process of impeachment, but since the failure of the attempt to impeach President Johnson in 1868 we may regard this remedy as lying outside the region of practical politics. Apart from this, he is irresponsible in the sense that there is no authority before whom he can be continually called upon to

justify his conduct in office. In saying that he is irresponsible we do not mean that he is not sensitive to the pressure of public opinion. If he desires re-election at the close of his first term he must of course shape his policy with a view to retaining the support of the electorate. This is the sole check, and it is not operative during the second term, since the unbroken tradition of American politics forbids any president, however distinguished, to be elected for a third term of office. During his second term he may be influenced by the possible effect of his policy upon the fortunes of his party, but he has no prospect of a personal return to power. The circumstances and tradition of political life in the United States do indeed compel the president, like all other American public men, to be acutely sensitive to every movement of national opinion. There is no country in the world in which the exercise of political power, however legally absolute it may be, is not in a greater or less degree limited by the restraining influence of public criticism; but the limitation thus imposed is a very different thing from the obligation to justify all actions from day to day before a definite body in which is vested the power of dismissal from office.

The autocratic power which the Constitution entrusts to the president involves as a logical consequence that he is in no way bound to maintain any general political agreement with the majority in either house of Congress. His authority is not derived from them and they have

no right to call him to account. The most notable historical example of this independence is to be found in the violent quarreling between the Congress and President Johnson in the years immediately following the close of the Civil War. In our own time we may recall the hostility shown to President Wilson by the Republican Congress which was elected in 1918, a hostility which was marked by the Senate's refusal to ratify the Treaty of Versailles. A critic having in his mind the course of parliamentary development in England might remark that it would at any time be possible for the Congress to control the president by refusing him the funds necessary for the conduct of government. Legally such action would be entirely within the competence of Congress, and the adoption of such a policy would result in transforming the president into an officer such as the French president or the English king, who is compelled to work through ministers acceptable to the more popular house. This power of the purse is not in fact used for any such purpose, since the tradition of American politics regards the executive independence of the president as an integral part of the Constitution, and public opinion would certainly condemn any attempt on the part of Congress to coerce him by the withholding of supplies. In the course of party struggles attempts are sometimes made to embarrass the president by adding to an appropriation bill what is called a "rider," that is to say, some other legislation

which the president would veto if he received it separately. This practice has more than once led to factional disputes of a kind wholly incompatible with the dignity of the national government, and it is now condemned by all the more respectable political leaders.

The Constitution expressly confers upon the president the right of vetoing bills passed by Congress, subject to the limitation that a bill can always be passed in defiance of his veto by a two-thirds majority in each House. This power, without the limitation, is in Great Britain one of the royal prerogatives. The fact that it has become obsolete is due, not (as is sometimes said) to the decline in the power of the Crown, but to the control which the executive government now exercises over legislation. Under the British parliamentary system all bills of importance originate with the government, and no bill can be carried without at least the friendly acquiescence of the ministry of the day. That being so, there is obviously no need for a veto upon bills that have passed both houses. What has happened is that the veto has been transferred to a different stage of the legislative process. It no longer follows legislation, but precedes it. In the United States the presidential veto is frequently exercised, since neither statute nor custom permit the president to control the law-making authority by any other means.

The treaty-making power, which the tradition of most European countries in the eighteenth

century had vested solely in the executive government, is in the United States shared by the president with the Senate, and the concurrence of two-thirds of the Senate is required for the ratification of any treaty. In most cases this is obtained without difficulty, but there have been numerous exceptions. The failure of President Wilson to secure the Senate's adhesion to the Treaty of Versailles is perhaps the most notable example of a disagreement upon this question. The general discussion of the treaty-making power belongs more properly to the sixth chapter of this book.

Except where statutes have otherwise provided, the patronage of all federal offices is vested in the president, subject to the concurrence of the Senate in the case of the highest posts. Beginning with the presidency of Jackson in 1829 this power of patronage became a source of great evil. Jackson inaugurated the "spoils system," under which the whole body of federal officials, down to the humblest country postmasters, were compelled to vacate office upon the inauguration of a new president, who was expected to replace them with his own political supporters. For more than half a century the interests of the public service were wholly sacrificed to this outrageous system. In the course of time the public opinion gradually came to realize that scandal thus created was intolerable, and in modern times the United States enjoys the benefit of a permanent civil service, though the area of executive patronage

in federal affairs is still very wide. To a large extent this power of patronage, although nominally vested in the president, is really exercised by his political supporters in local areas— a practice which leads for obvious reasons to undesirable results.

The Constitution has vested in Congress the power of making war and peace, which in Great Britain is technically a matter for the executive. In this instance the importance of the difference is rather theoretical than practical, for even under the British system the immediate necessity of obtaining money for the conduct of a war compels the ministry to obtain the consent of Parliament without delay. Furthermore the president may at any time be compelled by urgent necessity to take action which will result in hostilities, and in such a case there is nothing left for Congress to do except to recognize that a state of war in fact exists.

Let us now examine the main features of the executive government which rules the Dominion of Canada. We shall not expect to find the legal powers defined so closely as in the United States Constitution, since it was the desire of the statesmen at Quebec, as declared in the preamble to the British North America Act, that our Constitution should be "similar in principle to that of the United Kingdom." On the whole, therefore, it is true to say that the principles of executive government in Canada are substantially the same as those obtaining in the old country, and these have been made familiar to

all students in President Lowell's classic work. In the last few years the similarity has become less marked, for important changes are taking place in Great Britain, which are briefly indicated in a note at the end of this chapter. The features which I shall try to describe are those which exist in Canada to-day and were common to all the self-governing parts of the Empire until the tentative introduction of semi-presidential government in Great Britain under Mr. Lloyd-George.

Canada has taken over from Great Britain the principle of what is known as "cabinet government" or "responsible government." This system is the result of a slow historical development. Its beginnings are seen in the seventeenth century, and its modern history may be dated from the accession of George I, whose inability to understand English compelled him to discontinue the royal practice of presiding at the councils of his ministers. Like many other British institutions it was gradually developed for reasons of purely practical convenience, and only in the later stages of the historical development do we find the political theory stated in dogmatic form. It has been adopted without substantial alteration by all the autonomous dominions, and is the governing principle in a number of other European countries.

Under this theory executive responsibility is shared by a group of high officials who individually preside over the chief departments of government. They are universally known as "the

Cabinet," and are legally described as the "Governor-General in Council," but the formal phrase is never used outside official documents and may be ignored. It hardly need be said that the governor-general does not attend cabinet meetings and has no personal responsibility for their decisions, his duties in this connection being confined to signing the documents which are presented to him.

Let us now see how such a government comes into being. A Canadian administration has no fixed term of office, but resigns when it is placed in a minority either by a general election or by a vote of the House of Commons upon a serious issue of policy. When this happens, it becomes the duty of the governor-general to summon the statesman who is the acknowledged political leader of the successful party and request him to "form a government." The leader who is thus summoned becomes the "Prime Minister," and his first duty is to select the men who are to be his colleagues in the new administration. In choosing them he is restricted by practice, though not by law, to men experienced in political life who either hold or can readily obtain a seat in one or other house of Parliament.[1] Like the American president our premier usually finds it politically expedient to distribute his nominations as evenly as possible

[1] The Australian and South African constitutions have now erected this practice into a rule of positive law. The desirability of the rule in its present form is discussed in the last chapter of this essay.

among the different provinces. Under the modern practice it is almost essential for the premier himself to sit in the House of Commons, where he must be prepared to take the leading part in all business of first-rate importance.

It will be observed that our method of choosing an administration results in effect in that system of indirect election which the framers of the United States Constitution endeavored without success to introduce, that is to say, in the choice of the chief executive officer by a limited body of elected delegates who are in a position to judge of his personal qualifications for the office. As is well known, the American law provides for the popular election, not of the president, but of a body of electors who shall proceed to choose a president according to their own judgment. In practice this intention has been nullified. Almost from the beginning public opinion has demanded that the people shall vote directly upon the choice of the president, the electors being regarded as merely a formal medium for recording the popular decision. The Canadian administration is not technically elected at all, but is formally appointed by the governor-general. In effect it is elected by the House of Commons, or at least by the political party which the people have placed in a majority in that house. The premier himself is the elected leader of that party. His colleagues are chosen by him, with the knowledge that they must be acceptable

to his supporters in the House of Commons.[2]

When the new government is constituted, its members are bound together by a relationship very different from that which unites the American president to his cabinet. In the United States the members of the cabinet are subordinate officers under the orders of a commander, with whom alone rests the final responsibility for the executive acts of his government. The Canadian cabinet is more like a board of directors in which the prime minister acts as chairman. The fact that the members are also the chiefs of the various departments does not place them in a position of direct subordination to their leader. The common executive authority superior to all the departments is not the premier, but the cabinet as a body, known to the law as the "Governor-General in Council." Since the authority is collective, it naturally follows that the responsibility must also be collective. The whole body is responsibe for the acts of each member, and each member must be prepared to defend in Parliament and before the public the action of the whole body.

The Canadian administration further differs from the American in that it is not appointed to office for any definite term. A new government may be ejected from office within six weeks or it may last for twenty years.[3] A vote of censure

[2] It is of interest to note that the Irish Constitution provides for the formal election of the president by the Chamber of Deputies.

[3] Sir John Macdonald's second term of office lasted from 1878 until his death in 1891. Sir Wilfrid Laurier was prime minister from 1896 to 1911. In Great Britain during the same period no premier has ever held office for more than six years in succession.

or no confidence in the House of Commons involves the immediate resignation of the cabinet, and the same result would usually follow from a defeat of the ministry upon any legislative proposals of major importance. More commonly a change of government is brought about by the verdict of the people as expressed in a general election for members of the House of Commons. When this happens, the defeated ministry has the choice either of immediate resignation or of awaiting an adverse vote after the assembling of the new House. Modern practice now favors the former alternative. In any event the public convenience is the dominant factor. For example, when Mr. Meighen's government was defeated at the general election of November, 1921, the outgoing ministers retained office until Mr. Mackenzie King had completed the nomination of his cabinet and was ready to accept responsibility for the conduct of affairs, a process which occupied several weeks. Parliament was summoned as soon as the new cabinet was ready to meet it.

The relation of the Canadian executive to the legislature is one of the closest possible interdependence. In formal theory the ministry is supposed to be dependent upon the House of Commons, since resignation must inevitably follow upon the failure to command a majority in that house. In actual practice the two forces are much more evenly balanced, since the government controls a formidable check

upon any inclination of the House to make a rash use of its admitted rights. This check consists in the power of the executive to dissolve Parliament and thereby to compel all the members to submit themselves to their constituents for re-election. A general election is a troublesome and expensive matter for all concerned, and the members disperse to meet the electors with the certain knowledge that many of their number will not return. Since under our practice the government cannot be carried on unless the ministry can rely upon the support of the House of Commons any irreconcilable quarrel between the two powers necessitates a speedy appeal to the only authority which is competent to decide between them. Hence it follows that the members of the parliamentary majority are very slow to take a step which involves for each of them the certainty of much trouble and expense as well as the possibility of political extinction. The maximum life of any legislature is limited by law to five years and in practice a dissolution always comes before the legal limit is reached. Consequently a House of three or four years' standing is more likely to show independence of the executive than one which is newly elected, since the members feel that a dissolution cannot in any event be deferred much longer.

The American rule is designed to insure that the executive and the legislature shall be entirely independent of each other. The president holds office for four years and the House of

Representatives is elected for two. The House has no power to dismiss the president and the president is unable to hasten the dissolution of the House.[4] The separation between the two authorities is further emphasized by the rule which excludes the members of the administration from sitting in either house of Congress. In this connection it is interesting to note that the Southern statesmen who framed a Constitution for the Confederacy proposed to adopt a compromise between the British and American theories by permitting members of the government to speak in Congress, but without the right to vote. Proposals for the adoption of a similar practice in the United States Congress have often been made, but up to the present the general opinion of the country has not sanctioned any departure from the original rule of the Constitution.[5]

From this independence it has naturally followed that there is much less contact between the executive and the legislature in the United States than there is in Canada. Throughout the session of a Canadian Parliament the ministers are daily in the closest personal touch with both houses. Not only is it their duty to take charge of all bills affecting their

[4] He may, however, (1) convene Congress in special session and (2) adjourn Congress if the two houses fail to agree upon the question of adjournment.

[5] President Taft, in his message to Congress of the nineteenth of December, 1912, expressed himself strongly in favor of a change which would permit heads of departments to take part in the debates in each house.

respective departments, but they are also required to be ready to answer all kinds of questions propounded by individual members, and these questions may range over the whole field of administrative activity. This power of questioning is perhaps the most important means by which the House of Commons exercises its control over the executive government. An unsatisfactory reply to a question may lead to a debate, and the debate may imperil the existence of the ministry. Every member of the government must therefore possess in some degree the gifts of an advocate. He must be prepared to defend at any time the legislative proposals and administrative policy of the department for which he is responsible. His responsibility in this matter lies to the House and not to the prime minister. At the same time the premier and all his colleagues are closely interested in his success, for they are collectively answerable for his actions so long as he remains a member of the cabinet. The weak point in our system is that it makes the legislature too dependent upon the government. A greater freedom of independent action might safely be allowed without violating the essential principle of cabinet responsibility.

The American Congress maintains no such direct contact with the president or his cabinet. When he desires to communicate with Congress his message is almost invariably conveyed in writing. At least this was the unbroken practice from the time of Jefferson until that of Mr.

Wilson, who on an important occasion returned to the precedent set by Washington of visiting Congress in person. Furthermore the executive in the United States has no special right of initiating legislation or of controlling its course. The president can recommend to Congress the adoption of certain measures, but Congress is entirely at liberty to deal with his suggestions as it pleases, and the position of the president is entirely unaffected by any action which Congress may choose to take. It is not usual for the government even to propose the actual draft of the desired bill.

The fact that the procedure of Congress is entirely free from any executive control has rendered it necessary that the greater part of the actual work in both houses shall be done by means of committees. These committees form the only points of personal contact between the legislature and the executive. They examine witnesses on all kinds of matters of public interest, and in this way ministers frequently appear before a committee to explain some point connected with the administration of their departments. But a member of the cabinet stands on precisely the same footing as any other witness, and his tenure of office is in no way dependent upon the approval of those who question him. There is no legal reason why the president should not appear before committees, but considerations of dignity prevent him from so doing.

In this connection the student will observe that, so far as dignity is concerned, the president stands on an entirely different footing from the prime minister of a country under the system of parliamentary government. In the United States the titular head of the nation, who represents it for all formal purposes and to the outside world, is also the officer in whom the law and practice of the Constitution have vested the actual executive control. In Canada, as in England, France, and many other countries, the two functions are kept distinct. With us the governor-general fills the rôle allotted to the English king or to the president of the French Republic. He is the center of everything that is formal and ceremonial in affairs of state. He opens Parliament, signs commissions, holds reviews, and generally stands forth as the picturesque embodiment of the unity and authority of the nation. If Canada had any ambassadors to receive, he would receive them. The prime minister on the other hand has no dignity beyond what he can earn for himself by the force of his own character. He must defend himself among his equals on the floor of the House of Commons and must submit to be questioned and browbeaten like any of his colleagues. During the whole of his tenure of office he is a party leader fighting to maintain a position from which at any moment he may be driven out. In such a life there is but little room for dignity. His salary is calculated with reference only to the personal needs of a gentleman

of quiet tastes, the maintenance of official splendor being a matter for the governor-general.

It may be asked to what extent the Constitution of the United States has vested in the president anything in the nature of prerogative power. The answer to this, as to many other political questions, will depend chiefly upon the meaning which we choose to give to our terms. It may be said at once that the American president enjoys none of the minor personal privileges which the English king has inherited from medieval times. These are, however, no longer of any practical importance in the modern working of the British Constitution, and they are obviously inapplicable to Canada, since the sovereign does not reside within her borders. For practical purposes in modern constitutional theory the prerogative means the general residuum of undefined discretionary power which is vested in the chief executive authority of the nation. Upon this question different presidents have held different views, which are stated by Mr. Taft with great clearness in the Blumenthal Lectures[6] delivered by him at Columbia Univer- in 1915. His own opinion is expressed as follows (p. 139):

> "The true view of the executive functions is, as I conceive it, that the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied

[6] Published under the title of "Our Chief Magistrate and His Powers."

> and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest."

In contrast with this he cites the view of Mr. Roosevelt, as expressed on his behalf by Mr. Garfield, then Secretary of the Interior (p. 141):

> "Full power under the Constitution was vested in the executive branch of the government, and the extent to which that power may be exercised is governed wholly by the discretion of the executive unless any specific act has been prohibited either by the Constitution or by legislation."

Where authorities of such eminence disagree, a purely academic writer, particularly if he is a citizen of another country, may well hesitate to offer his opinion. Their disagreement is by itself sufficient proof that the text of the Constitution is not conclusive upon the question, and we must then go on to ask which interpretation is supported by actual practice. I venture to think that if Mr. Taft's lectures had been delivered a few years later, the difference of opinion between him and his predecessor might have been almost eliminated. The outstanding fact is that in each of the two great crises where the needs of the nation have called for a vigorous use of prerogative power the executive has risen

to the occasion, and the courts, as well as the nation at large, have supported it in the exercise of its claims. There is no doubt whatever that in a similar emergency a future president would act in the same way and therefore it is a point of scarcely more than academic interest to inquire under which theory his action can be justified. In truth it can be justified on either. For example, Lincoln's Emancipation Proclamation can either be defended, as Mr. Taft defends it, as an act of the commander-in-chief dictated by military necessity, or on Mr. Roosevelt's theory of the general discretion of the president to take what action he deems necessary for the welfare of the nation, unless positively prohibited by law. In a crisis the same result is reached by either road, and it is in a crisis that the real powers of a national executive are put to the crucial test.

Let us now hear what Blackstone has to say (Book I, ch. 7):

> "In the exertion of lawful prerogative the king is and ought to be absolute; that is, so far absolute that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offenses he pleases; unless where the Constitution hath expressly, or by evident consequence, laid down one exception or boundary, declaring that thus far the prerogative shall go and no further."

That would seem to be Mr. Roosevelt's theory.

The common-sense solution of such abstract difficulties appears in the next paragraph:

> "In the exertion therefore of those prerogatives, which the law has given him, the king is irresistible and absolute, according to the forms of the Constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonor of the kingdom, the Parliament will call his advisers to a just and severe account. For prerogative consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner."

We have already noted that the executive veto on legislation has fallen into disuse in England by reason of the fact that the government initiates all bills of importance and controls the passage of legislation in the House of Commons. In general the same rule holds good in Canada. So far as the executive veto still exists, it is a feature, not of the internal government of Canada, but of her relations with Great Britain. The British North America Act empowers the governor-general to use his discretion in either assenting to bills, refusing assent, or reserving them "for the signification of the Queen's pleasure," that is to say, for the consideration of the British Government. At the time of confederation it was contemplated that the governor-general should be an active agent of the ministry in London, exercising an

effective control over Canadian politics in the interests of the home government; and the instructions given to holders of the office prior to 1878 required them to reserve eight classes of bills. This practice was then dropped upon the representation of the Dominion cabinet, the Colonial Office being content thenceforth to rely upon the statutory right of disallowing any act within two years of its passage. With the gradual development of the sentiment of Dominion autonomy this right of disallowance has fallen into disuse and it has not now been exercised since 1891. At the present day any attempt to veto the legislation of the Dominion Parliament upon a matter falling within its legal competence would undoubtedly lead to grave political difficulties. In cases where the Parliament has exceeded its legal powers the remedy lies with the courts rather than with the Colonial Office.

In all countries the executive government necessarily enjoys a large discretionary power with regard to the pardoning of criminals and the mitigation of sentences, but the exercise of this prerogative of mercy does not stand upon quite the same footing in the United States as it does in Canada. The prerogative of mercy is an instance of sovereign power, and in Canada there is only one sovereignty throughout the Dominion, though it may function through different agencies for different purposes. Criminal law being a matter of Dominion competence, the power of pardon or mitigation of sentence

naturally becomes a matter for the federal executive.[7] The primary responsibility rests with the minister of justice, who usually receives a report from the judge who has tried the case, which he will consider together with any petitions presented by persons interested. As in all other questions of executive policy his responsibility for the actual decision is shared by all his colleagues, and any case of difficulty will therefore be considered by a cabinet council.

In the United States, as we have already seen, the sovereignty of the nation is a distinct thing from the sovereignty of the individual states. The greater part of the criminal law is exclusively a matter of state competence and with this the president has therefore no concern, the prerogative of mercy being vested in the state governor, who usually acts upon the advice of a special committee known as the "Board of Pardons." The federal criminal law consists only of a group of statutes defining and penalizing offenses in relation to such matters as fall within the legislative competence of Congress. With respect to these the president possesses the power of pardon, which may be exercised either before or after indictment and conviction. Since this right is conferred upon him directly by the Constitution, it is not within the power of Congress to restrict him in its exercise. The

[7] It is within the competence of the provincial legislatures to penalize offenses against their own statutes relating to matters of local order, and the provincial executive consequently has the right to remit such penalties.

pardoning power does not extend to cases of impeachment.

Let us now turn to consider the nature of the executive power in the states of the Union and in the provinces of Canada. On the American side we notice at once a fundamental difference of principle between the character of the federal executive and the systems which have been established by the states upon their own initiative. The Federal Constitution was framed in the eighteenth century by men who were keen students of political science and had accepted the general principle of the unity of the executive government as they saw it in operation in the European world. This theory requires that the executive power, whether it be vested in one man or in a council, shall be exercised as one, and that its responsibility, if any, shall be undivided. In this respect the American president and the Canadian cabinet are governed by the same principle.

The Constitution of 1787 left the several states entirely at liberty to devise for themselves any form of constitution that was republican in character and not in conflict with that of the United States. As the nineteenth century passed and the new lands were rapidly developed by large numbers of pioneer settlers practically uninfluenced by the older doctrines of political science, it soon became apparent that the constitutional law of the states was going to be based upon new and unfamiliar principles.

The political thought of America in the

nineteenth century is a remarkable example of the dominance of a single word and of its association exclusively with a particular form of political machinery. That word was "democracy." To-day almost everyone in every country professes himself to be a democrat, and this universal profession of democracy in the abstract has certainly helped us to realize that the word is very difficult to define, and that the harmonizing of government with the will of the people, which is at any rate agreed to be the main purpose of democracy, is attainable in practice by many different political methods. But in the American thought of the nineteenth century it came to be regarded practically as a binding dogma that true democracy could only find its realization through the one method of choosing the largest possible number of public servants by direct popular vote. In the pursuit of this principle the idea of a unified executive was entirely abandoned. The people were to be called upon to vote separately for each officer of the state government. If parties in any state were at all evenly balanced it might well happen that the governor should be a Republican and the state secretary a Democrat. Even if they were of the same party there was no guarantee of that personal sympathy which would enable them to work together in harmonious co-operation. Unlike the members of the federal cabinet, the inferior officers of the state governments usually are not under the direction of the governor, nor are they bound

together by the doctrine of cabinet solidarity which obtains in Canada and other parliamentary countries. In no case are they responsible to the legislature, though in many states they can now be dismissed by a "recall," that is to say, by a special popular vote organized for the occasion on the principle of the referendum.

By the adoption of this theory a great burden of electoral responsibility has been placed upon the shoulder of the people. The limits of this essay obviously do not permit even the most general survey of the provisions of the forty-eight state constitutions, and we may select a fair example in that of Illinois, which derives a special importance from the fact that the state includes the great city of Chicago.

Under the heading of "Executive Department," the constitution of Illinois provides for a governor, lieutenant-governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, and attorney-general, all of whom are to be chosen separately by direct popular vote. Each of them holds office for four years, except the treasurer and the superintendent, who are only elected for two. In addition to these officers, who are chosen by the vote of the whole state, the people of each county are called upon to elect state attorneys, constables, and county superintendents of the schools, also for short periods. Then come the officers of the county government, namely the county judge, clerk, sheriff, treasurer, coroner, and clerk of the

circuit court. It should be added that all judicial officers, from the highest to the lowest, are also popularly elected for varying terms.[8] In addition to these burdens the unfortunate citizen is called upon to vote at frequent intervals for the president of the United States, for both houses of the Federal Congress, and for both houses of the Illinois legislature. Some states provide for an even greater multiplicity of elections, and in many states the voter can now also be summoned to the polls under the provisions creating the initiative, referendum, and recall.

If the object of the democratic theory be to ensure that the government shall be as closely as possible harmonized with the will of the people, it may well be doubted whether this enormously elaborate machinery of elections is the means best calculated to achieve that end. The popular will can only be an effective instrument of government in so far as the people are in a position to understand and to judge the issues upon which they are called upon to vote. Professor Charles A. Beard illustrates the impossibility of the task placed before the voter by citing the example of a ballot paper, not in any way exceptional, which was distributed to the electors of a certain district in Chicago in 1906.[9] It was twenty-six inches long by eighteen and one-half inches wide and contained the names of three hundred and thirty-four candidates. Now it is perfectly obvious that no voter in Chicago

[8] The election of all these officers is provided for by the state constitution. In addition the legislature may create a large number of other elective offices, and in some states this power is widely used.

[9] "American Government and Politics," p. 475.

or anywhere else is able to exercise a real personal judgment upon the merits of the names submitted to him in such a stupendous list. Furthermore, it must be remembered that these elections are usually preceded by "primaries," in which the elector has to vote for the selection of the party nominees, and that all elections are of very frequent recurrence.

The natural result of all this has been to throw the real power of selecting men for public office into the hands of the professional politicians. The electoral and primary laws are so intricate that it takes an expert to understand them, and in addition there is a vast amount of organization required in preparing lists of candidates from every party for every office, as well as in doing all the miscellaneous work of party politics. The men who select the names are not the responsible heads of the executive government, who as such are responsible for the good administration of the state, but a number of obscure individuals, working in secret, who regard their power of patronage as a means of advancing their own interests. The system of countless elections was invented in order to get rid of patronage, because the right of patronage was deemed to be inconsistent with democracy. What it has done in practice has been to transfer the patronage from high officers of state, working in the light of publicity, to private persons, always irresponsible and often disreputable, working in secret for their own private ends. Patronage can never be abolished in fact, and

sound democratic policy should therefore direct its efforts towards ensuring that those who exercise the power of patronage should be held strictly accountable to the public for the use which they make of that power.

A foreign observer may well feel a certain diffidence in criticizing adversely an institution which has been so generally adopted throughout the United States. But he may be reassured by the reflection that it has been vigorously condemned by many of the ablest American statesmen and authors, and that it is in obvious conflict with the theory of administrative efficiency upon which the Federal Constitution rests. To Washington and Hamilton the whole idea would have appeared absurd, and there is no doubt whatever that its application to federal affairs would have wrecked the government of the nation in such a crisis as that of the Civil War. The system of electing everybody is only possible in the states by reason of the fact that the state executive is never called upon in practice to initiate any important policy or to handle a crisis demanding real qualities of political leadership. If the governor ever finds that a particular situation is getting out of hand he is entitled to call upon the president for aid. Where the qualities of leadership and command are likely to be demanded, as in the case of the Philippines, American statesmen have insisted upon the principle of the unity of executive control.[10]

[10] Upon the government of the Philippines, see below, pp. 197–201.

By far the greater part of state executive work is mere routine, since the Constitution and the laws of each state are usually framed so elaborately as to leave the minimum of discretion to the governor. The prerogative of mercy remains with him, but he is usually compelled to act upon the advice of a board which he can in no way control. The most valuable power that really is vested in him personally is that of vetoing bills passed by the legislature. In some states he is allowed to veto particular items in appropriation bills, and this power is a very useful instrument for enabling him to prevent financial jobbery. There are, however, always certain provisions which enable a bill to be passed over the governor's veto.

Any other administrative functions of special importance are usually taken away from the governor and vested in some other officer chosen by direct election. For example, the control of education, one of the chief duties of the modern American state, is generally given to an elected superintendent of schools, who in the discharge of his office is entirely independent of any orders of the governor. But the infinite subdivision of control and responsibility does not stop even here. There is sure to be some elected board or commission with whom the superintendent will have to share his powers, and the state university will probably be governed by yet another board, also elected by direct popular vote.

In truth it is not really accurate to speak of

"the executive" at all when dealing with the state constitutions. There are in every state a large number of executive officers and bodies, independent of each other and not united by the control of any common superior. Nominally the common control is invested in "the people," but in actual practice the possibility of any real and well-informed popular control is defeated by the bewildering complexity and frequency of the innumerable elections.

A few minor points of interest may be briefly noticed. Most of the states endeavor to secure complete religious toleration, but a few require some kind of belief in God as a qualification for public office. Two go so far as to demand a belief in heaven and hell. New Mexico takes pains to provide that no man shall be disqualified from public office by reason of his inability to read and write, a rule which perhaps marks the extreme example of the willingness to subordinate the efficiency of the public service to the demands of democratic theory. A few states have deemed it necessary to ordain that lunatics are not eligible for state office, a precaution which seems to indicate a certain lack of confiddence in the discretion of the electorate. Women are now generally eligible on the same terms as men.

A very small number of states have broken away from the general tradition so far as to provide for the establishment of a state civil service, admission to which is obtained by examination.

The provinces of Canada are organized, so far as executive functions are concerned, upon the same principle as the Dominion, and there is little that requires special notice. The lieutenant-governor is an officer appointed by the Dominion government, and may be removed by the same authority for cause assigned. He is the formal link between the Dominion and his province, but he is not entrusted with any real executive functions, and the office has come to be regarded as a kind of agreeable sinecure, to which the ministry of the day appoints one of its chief local supporters who desires to retire from active political life. The lieutenant-governor is the titular and ceremonial head of the provincial government, and executive acts are usually done in the name of "the Lieutenant-Governor in Council." In practice this phrase means the provincial cabinet, which consists, as in the Dominion, of a prime minister and the heads of executive departments, who are required by the parliamentary tradition to be members of the legislature. The relations of the cabinet to the legislature are the same as those which prevail at Ottawa, and it is provided by law that all financial measures must be initiated by the government.

Except in matters of municipal government, the rules relating to which vary considerably, the Canadian elector is never called upon to vote directly for executive officers. He may have to vote about once in every four years for the Dominion House of Commons and perhaps once

in three years for a member to serve in the provincial legislature. At infrequent intervals he may also be invited to vote upon some special popular referendum, usually relating to the prohibition question. Indirectly his votes given upon these occasions govern the appointment and policy of the executive, but he is never asked to choose an executive or judicial officer, except perhaps the mayor of his city, by direct vote. His control over the ministers is exercised by their daily responsibility to the legislature, which in turn is dependent upon the general body of the voters. If a serious difference of opinion should arise between the executive and the legislature, the electors have the power of deciding between them at the general election which such a disagreement will necessitate.

Both in the Dominion and in the provinces admission to the executive civil service is very largely controlled by examination, and promotion is generally awarded on merit. A civil servant is not supposed to take any active part in politics, and, with the exception of the political chiefs, executive officials are not displaced by a change of government.

No religious tests of any kind are imposed by law as qualification for any public office in Canada, but in practice the discretion of the executive government in making appointments is somewhat fettered by the traditional policy of observing a fair balance between the chief racial elements in the nation. For example, it is now the invariable practice that the two

Quebec judges on the Supreme Court of Canada shall be appointed from among French-speaking Roman Catholics, and from their ranks it is also customary to select the chief justice of the Province of Quebec. Conversely, the chief justice of the Superior Court at Montreal is usually an English-speaking Protestant. The lieutenant-governor of Quebec is always a Roman Catholic, though not invariably a Frenchman. In practice it is also necessary for the prime minister of Canada to maintain a certain balance between races and creeds in selecting the members of the federal cabinet.

NOTE TO CHAPTER II

Recent developments in England have indicated a tendency, which may perhaps go far, to depart from the hitherto accepted theory of cabinet government as it still obtains in the Dominions. When the war of 1914 broke out, the British Cabinet had gradually reached the inconveniently large number of twenty-three members, and a body of this size proved to be most unsuitable for the discussion of the urgent problems that arose in the course of the war. It was therefore decided to form a small inner committee of the cabinet to deal with these questions, and this body was known as the "War Cabinet." In addition Mr. Lloyd-George attached to his own office a special secretarial staff charged with the duty of co-ordinating the work of the various departments. After the conclusion of

peace the "War Cabinet" was discontinued, but the prime minister's secretariat has remained and seems likely to be accepted as a permanent institution.

Under the new practice an official of this secretariat attends cabinet meetings and records minutes of the proceedings. This is a marked departure from the traditional theory of cabinet government, according to which the meetings were confidential and informal gatherings of colleagues, at which it was contrary to custom for any minister except the premier even to take a personal note of anything that passed. Furthermore the existence of the new official organization enables the prime minister to exercise a general control over the work of the departments, and even to take action affecting them upon his own responsibility. This has been particularly noticeable in the matter of foreign affairs. During the numerous diplomatic crises of the last few years Mr. Lloyd-George frequently assumed the personal direction of foreign policy, the secretary of state being placed in a position which was clearly that of a subordinate. The incident which perhaps excited most comment was the publication on the sixteenth of September, 1922, during the Greco-Turkish crisis, of an important pronouncement on the principles of British policy, which was issued by the prime minister's secretariat without consulting the Foreign Office.

It is also relevant to note that in 1917 the generosity of a private donor (Lord Lee)

presented the nation with a magnificent country house not far from London, to be occupied by the prime minister for the time being, and a special statute was passed for the purpose of accepting the gift and putting it upon a proper legal basis. This stately mansion, known as "Chequers Court," already seems in a fair way to be regarded as an English equivalent of the White House, and recently much of the government of the country would appear to have been directed from within its walls.

These developments clearly indicate a tendency to make the British prime minister a kind of president, the other members of the cabinet taking rank as his subordinates. The change was further emphasized by the fact that Mr. Lloyd-George withdrew to a certain extent from active participation in the work of Parliament, the duty of "leading" the House of Commons being devolved upon another minister.

It is too soon as yet to say how far the new policy will be carried, and political opinion in Great Britain appears to be divided upon the question. Since the preceding paragraphs of this note were written Mr. Lloyd-George's government has given place to that of Mr. Bonar Law. The new prime minister has reduced the numbers of his cabinet to sixteen and has somewhat curtailed the functions of the secretariat, particularly in relation to foreign affairs.

CHAPTER III

LEGISLATIVE POWER

According to the accepted theory of the British Constitution the sovereignty of the whole nation finds its complete legal expression in the Parliament, that is to say, in King, Lords, and Commons acting together in accordance with certain rules of procedure. There are no powers reserved to the people or to any other agency of the national will which cannot be exercised by Parliament if it chooses to do so. The fact that executive and judicial duties are performed by different agencies is due to reasons of practical convenience, and not to any theory of the so-called "separation of powers." Parliament is legally capable of exercising both executive and judicial powers, and in point of fact is frequently doing so. A glance through the pages of the British statute book for any particular session will reveal a large number of "private acts," and some public ones, which are really executive decisions upon particular cases, though for technical reasons they may require legislative sanction. Similarly in passing divorce bills at the instance of private parties, Parliament acts in a purely judicial capacity. Under the modern practice the actual investigation of

these cases is left by tacit understanding to the legal members of the House of Lords, but the decree of divorce takes the form of a statute.[1] In former times Parliament used to assume the functions of a criminal court by passing statutes known as "Acts of Attainder" or "Acts of Pains and Penalties." Such legislation is still legally possible, though the practice has long since fallen into disuse, and any attempt to revive it would be utterly at variance with the most elementary principles of constitutional liberty.

Political or moral sovereignty may reside in the nation at large, in the sense that Parliament is morally bound to act in accordance with what it believes to be the will of the people, but for all legal purposes its own sovereignty is complete and perfect in every respect. A series of judgments in the Privy Council has made it abundantly clear that this principle of the sovereignty of Parliament is fully applicable to the various legislatures of Canada. With us the law-making power is a complete expression of the national sovereignty, and the whole power of the nation can express itself upon any matter through one or the other of its legislatures. The supreme power of legislation is distributed, but it is not

[1] The Divorce Act of 1857 rendered such special acts unnecessary in England, but they have been frequently passed for the relief of parties domiciled in Ireland. In future Parliament will probably decline to intervene in Irish matrimonial cases. Special divorce acts were often passed by American legislatures in the colonial period, and sometimes even later, but they are now usually prohibited by the state constitution.

delegated. Neither the Dominion Parliament nor the provincial legislatures are in any way delegates of the British Parliament, nor are they in any legal sense the delegates of the Canadian people. The area of legislative activity is marked out in such a manner as to allot certain specified matters to the provinces, the remainder being left to the Dominion Parliament. Between the two the whole possible field of domestic legislation is completely covered. The only restrictions are external, being designed to ensure that the relations of Canada with the other component parts of the Empire shall not be changed without the consent of all parties concerned.

From this it results that in practice the Canadian Constitution only presents two problems for the consideration of the courts. One of these consists in determining questions of property between the Dominion and the provinces. The other issue relates to the distribution of legislative power. Does the subject-matter of a particular statute fall or does it not fall within the list of legislative powers exclusively reserved to the provinces? If it does not, it must necessarily be a matter of Dominion competence. Somewhere or other there must be found the power to do everything, subject only to the restriction that it does not disturb the external relations of Canada with the other members of the Empire.[2]

[2] Upon this see the judgment of the Privy Council cited below, p. 214.

This principle of legislative sovereignty is in marked contrast with the doctrine that has inspired the Constitution of the United States. The theory of the "separation of powers" was taken by the Philadelphia statesmen from Montesquieu, who by a curious misunderstanding considered it to be exemplified in the case of Great Britain. It was fully accepted by the framers both of the federal and the state constitutions, and forms the most notable example of an attempt to give legal expression to an abstract dogma of political science.

Under this doctrine national sovereignty remains in the people at large, and its exercise is only partially entrusted to the various organs of the national government. Certain specified powers are entrusted to the legislature, others to the executive, and others to the judiciary.[3] None of these authorities is in a position to say, "*L'état, c'est moi*," an expression which the British Parliament might proclaim as a perfectly accurate statement of the law.

The matter is further complicated by the theory which we noticed in the first chapter, that throughout the United States there are two sovereignties in continuous operation, the sovereignty of the whole nation and that of each particular state within its own area. But whether we are dealing with the federal or with the state governments, in each case the doctrine

[3] Certain American decisions lay down that of these three powers the legislature is paramount, and that it can exercise the whole sovereignty except in so far as it is prohibited from doing so.

of the separation of powers holds good. The Congress does not express the whole sovereignty of the nation,[1] and the state does not entrust its whole sovereignty to the state legislature. Congress is a delegate entrusted with such powers as have been assigned to it and with none others. The state legislatures, though not delegates in the same sense, exercise only such powers as remain after the people have assigned some to other departments and withdrawn others from the competence of any branch of the government.

These two theories have resulted in widely different methods of handling the question of legislative powers. Under the influence of the Canadian doctrine there is a distribution of the various subjects of law-making between different bodies, but there is no attempt to restrict their activities within their allotted areas. Once establish that a statute relates to a subject-matter within the competence of the particular legislature, and the courts cannot annul it on the ground that its object or tendency is to effect some prohibited purpose. Within the area of its proper subject-matter every Canadian legislature is omnipotent for good or evil. It is true that a provincial statute may be disallowed at will by the Dominion government, but this is a matter of executive discretion and has no bearing upon the question of legislative powers.

[4] Except perhaps in relation to the imperial possessions of the United States. Upon this point see below, p. 197.

The courts cannot invalidate a statute on the ground that it creates a crime *ex post facto*, that it impairs the obligation of a contract, or that it encroaches upon the authority of the executive or the judicial departments of the government. The Dominion Parliament, in which is vested the general legislative power, may enact and does enact numerous statutes which logically are matters of executive or judicial competence, and the provincial legislatures may do the same, provided the subject-matter is one with which they are empowered to deal.

In contrast with this there is no more remarkable feature of American constitutional law than the enormous number of restrictions which the people have seen fit to impose upon their various legislatures. The Federal Constitution contains a number of prohibitions addressed both to Congress and to the states, but the reader can hardly realize how far the policy of restriction has gone until he examines some of the state constitutions. Every one of these documents begins with a "Declaration of Rights," in which the legislature is usually prohibited from passing laws interfering with religious freedom, freedom of speech, and many other traditional privileges which in Canada are protected by public opinion rather than by law.[5] In addition the class of legislation which we know

[5] It may be noted that the new Constitution of the Irish Free State begins with a declaration of "fundamental rights" after the American model. The Australian Constitution contains a guarantee of religious equality.

as "local and private acts" is generally forbidden or narrowly restricted. It is also customary to incorporate in state constitutions a miscellaneous body of rules relating to various topics of ordinary private law, with the result that these rules cannot be altered except by constitutional amendment. Many constitutions forbid the legislature to borrow money upon the credit of the state. Even in those states where the people have the right of legislating directly by means of the "initiative and referendum" their activity is subject to any express limitations contained in the "Declaration of Rights," and sometimes to the other restrictions laid upon the legislature. They could not, for example, pass a law penalizing the worship of a particular religion.[6]

Furthermore the legislature has no authority to pass statutes which might be construed as interference with the constitutional rights of the executive or the judiciary or for relieving them of duties which are thereby imposed upon them. If the Constitution authorizes the president or the governor to do a particular thing, the legislature cannot control him in the doing of it. Mr. Taft gives a good example of the extent to which this doctrine may go ("Our Chief Magistrate," p. 40). The Constitution, he points out, requires the president to commission all

[6] It is interesting to note that the Constitution of Ohio, as amended in 1914, contained a clause prohibiting legislation of the type known as "prohibition." This has subsequently been altered to conform to the federal Eighteenth Amendment.

officers of the United States, and the growth of the country has caused this duty to entail an enormous amount of work of a purely clerical nature. Yet it would be impossible for Congress to pass a simple statute relieving the president of this purely physical labor, since the Constitution contains no provision for any such delegation.

The actual distribution of legislative powers involves no large question of principle, and we can therefore content ourselves with noting briefly the main points of comparison between the American and the Canadian systems. Each aims in general at giving to the federal legislature the power to deal with those subjects which are deemed to be of general or of national importance, matters of local interest being reserved or entrusted to the states and provinces respectively. Nevertheless the two constitutions indicate markedly different opinions as to the correct application of this principle. The American statesmen proceeded upon the theory of granting to Congress only those powers which related to the external activities of the nation and to such internal matters as necessarily require the adoption of uniform practice throughout the country. The general body of law that governs the rights and liabilities of the individual citizen, both in civil and in criminal matters, was left to the states.[7]

[7] The Eighteenth Amendment (1919), relating to liquor prohibition, would appear to be inconsistent with this earlier principle. Upon the original theory of the Constitution everything relating to the "police power" was a matter of state competence.

The Canadian Constitution agrees with the American in giving, or rather in reserving, to the Dominion Parliament all powers necessary to the maintenance of external unity and internal order, but it goes further in holding that there are certain parts of the ordinary law with regard to which local diversities are undesirable. For example, it was thought necessary that there should be one uniform criminal law throughout the Dominion. It was not considered expedient that a man's guilt or innocence should depend upon whether he committed a particular act upon one side or the other of a provincial boundary. Criminal law and procedure were therefore expressly made matters of Dominion competence and they have since been embodied in a single code.

A strong feeling that the interests of business demanded the existence of a common body of commercial law gave to the Dominion exclusive powers to legislate upon banking, the incorporation of banks, negotiable instruments, interest, bankruptcy, patents, and copyrights, as well as a general control over "the regulation of trade and commerce." In contrast with the general language of this last clause, we may note that the American Congress is only authorized "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." It may also legislate on bankruptcies, patents, and copyrights, but not upon the other subjects mentioned above. In strict logic the Canadian theory should also have

covered such matters as the sale of goods and other commercial contracts, but this was not done.[8] The passage of time has now impressed upon all business men the necessity for uniform commercial laws, and on both sides of the frontier the defects of the two constitutions in this respect have been largely made good by the voluntary adoption of uniform statutes by the states and provinces respectively. For example, practically all the American states have now adopted uniform statutes upon negotiable instruments and sales. Similarly the eight common law provinces of Canada have all adopted the main provisions of the English Sale of Goods Act, and there has been a general disposition to copy any English statute which has proved to be of practical value. On the other hand, the strong tradition of the French civil law is preserved in Quebec with a natural and proper affection which usually renders that province disinclined to participate in any schemes for legal uniformity; but in most commercial matters the differences that remain relate to matters of form and technical expression rather than to the substance of the law.

The inconvenience arising from a diversity of divorce laws in the United States impelled the draftsmen of the Canadian Constitution to

[8] In the Privy Council, which has always shown a leaning toward the provincial point of view, it has been held that licensing of insurance companies belongs to the provinces as a matter of "property and civil rights," instead of falling to the Dominion under the head of "the regulation of trade and commerce."

assign to the Dominion the exclusive power to legislate on "marriage and divorce."[9] As we have already noticed, this power has never been exercised, since it would prove almost impossible to enact a statute of uniform application that would not cause serious offense to one section or another of Canadian opinion. There is therefore a considerable diversity between the divorce laws of the various provinces, none of which are able to legislate themselves upon the matter. In the provinces of Quebec and Ontario the courts have no jurisdiction to grant a dissolution of a marriage validly contracted, and persons seeking to be divorced in those provinces are therefore compelled to obtain a private act from the Dominion Parliament. It is the practice of Parliament, following the British precedent, to handle these applications in a judicial manner, the investigation of the merits of each case being entrusted to a committee of the Senate.

Let us next examine the structure of the law-making bodies. In each country the federal legislature is a two-chambered assembly, but the resemblance does not go much deeper than that.

The structure of Congress represents the solution which Hamilton and his friends devised for reconciling the conflicting claims of national and state authority. The House of Representatives is designed to represent the citizens

[9] The provinces may regulate "the solemnization of marriage," and it is not always easy to draw the line correctly between the two jurisdictions.

of the United States, divided into geographical constituencies upon a basis of population, with the result that the most populous states return the largest number of members to the House. It is required by law in most states and by custom almost everywhere that candidates must reside in the district which they seek to represent. The election takes place every two years in the month of November, and there is no power in the country which can abridge or extend the tenure of each new House. The expiring Congress continues to sit for several months after the election of its successor, with the inconvenient result that legislative power is often exercised by a body which the electorate has condemned. The electoral franchise depends upon state laws, subject to the Nineteenth Amendment (1920), which now gives the vote to women. Only two special powers are conferred on the House which it does not share with the Senate. One is the right of preferring impeachments, in which case the Senate acts as judge. The other is the privilege of initiating all bills for the raising of revenue, a rule copied from the practice of the British Constitution, where it rests upon a conventional but not upon a legal basis. In the United States there is no conventional understanding to debar the Senate from exercising its legal right of amending money bills, and it frequently does so. Tax bills may lawfully originate in the Senate, so in actual practice the House enjoys no special privileges with regard to finance.

The Senate, on the other hand, was designed to be a body in which the states should each have an equal individual representation, irrespective of their population or importance. Each state sends two senators, who are now chosen by direct popular election, though the original scheme provided that they should be chosen by the state legislatures. The Constitution expressly provides that no state can be deprived without its own consent of its equal representation in the Senate.

The importance of the Senate in the political life of America, an importance which distinguishes it sharply from the weak second chambers of many other countries, lies in the fact that the Constitution arms it with special privileges which it does not share with the other House. We have already noticed that it has the right to try cases of impeachment, but the occasions for this are naturally rare. The real strength of the Senate is derived from the share assigned to it in the executive government of the country. In this instance the statesmen of 1787 determined to disregard the sacred doctrine of the separation of powers. Conscious of the enormous strength for good and evil which might be exerted by an irremovable and irresponsible president, they resolved that in certain important matters he should be unable to commit the nation by his uncontrolled will. Of the many dangers which oppressed men's minds in the infancy of the Republic, perhaps none seemed greater than the peril to their

new-found independence which might lurk in foreign entanglements. The classic expression of this anxiety is to be found in Washington's farewell address. To a large extent it influences American opinion even at the present day, when the United States is firmly established in the front rank among the nations of the world, and the persistence of the idea sometimes surprises those foreign observers who do not realize the intense conservatism of American thought in regard to everything that touches the national institutions. The treaty-making power of the president is therefore shared with him by the Senate, and a two-thirds majority is required for the ratification of any treaty. The detailed scrutiny of foreign affairs is entrusted by the Senate to a special committee, and with this committee the administration finds it necessary to remain closely in touch.

The Constitution also requires the president to obtain the approval of the Senate for all the more important appointments in his gift. This rule covers appointments to foreign embassies, to the judicial bench, to the cabinet, and certain others. Minor offices are dealt with by special statutes. The consent of the Senate is not necessary for the dismissal of an officer, except in the case of the judges, who can only be removed upon impeachment.

The Senate as a body is not subject to dissolution. Each member holds his seat for six years, and the scheme of elections is arranged so that a third of the whole number of seats is

vacated every two years. Casual vacancies can be filled in accordance with arrangements made by the state concerned.

In Canada the Dominion House of Commons is elected upon the same principle as the House of Representatives, that is to say, by the distribution of the country into geographical constituencies upon the basis of population. It is provided that the Province of Quebec shall always return sixty-five members, and this figure is the standard for calculating the numbers to which the rest of the country is entitled. Candidates need not reside in their constituencies. In most cases they have close personal connections with the place which they seek to represent, but cabinet ministers and other well-known members can usually obtain election in a number of localities. The maximum life of a legislature is fixed by law at five years, but it is always liable to earlier dissolution at the will of the government, and in practice it is not usual for the House to die a natural death. The present Parliament, which was elected in November, 1921, is the fourteenth since the establishment of Confederation in 1867.

The Canadian Constitution has adopted the British practice whereby all bills relating to revenue and appropriations must originate in the House of Commons. As in the United States, this has been made with us a definite rule of law, instead of resting, as it does in Great Britain, upon a traditional understanding. Following the tradition of the House of Lords, the Senate never

makes any material amendment in a money bill, and since 1870 it has never attempted to reject a bill of this character. So far as financial legislation is concerned, the Dominion Parliament is practically a one-chamber assembly. Apart from this, the House of Commons has no privileges which it does not share with the Senate. The practice of impeachment, which is still a live part of the American Constitution, has become wholly obsolete in Great Britain, and there is no reference to it in the British North America Act, though it is provided that a judge can only be removed from office upon an address presented by both houses.

A very important rule provides that no revenue bills or resolutions can be adopted except upon the recommendation of the executive government. In this case again, Canada, like the other dominions, has given legal expression to one of the leading conventional rules of the British Constitution. In no particular is the difference between the Canadian and the American practice more significant, for it governs the whole system of public finance. To the practical consequences of this divergence we shall return in a later chapter.

When we turn to examine the Dominion Senate we come to what is probably the weakest feature in the Canadian Constitution. In studying the debates on the question of confederation which occupied the Canadian Parliament in 1865, one is struck by the amount of attention devoted to the problem of the composition of

the Senate and by the anxiety which was felt lest it might assume too much power.[10] In no respect were the expectations of the day more completely falsified. Sir John Macdonald explained in the course of the debates that the framers of our Constitution had aimed at reproducing as closely as possible the British House of Lords. Exact imitation was impossible, since there was no territorial aristocracy in Canada, and it was obviously impossible to introduce hereditary tenures. Consequently, so he went on to say, they had done the next best thing in providing a Senate whose members should be nominated by the Crown to hold office for life.[11] Macdonald failed to see that no political assembly can have any real moral strength except in so far as it represents either the nation or some element in the nation. The House of Lords is by no means representative of the English people, but it represents very faithfully an important class or section of the English people, that is to say, the country gentry and the agricultural interests associated with them. At least this was the case in 1865, though in recent years the indiscriminate sale of peerages to wealthy business men and successful politicians has largely altered the character of that house. The senates of the United States,

[10] At that time "Canada" meant the present provinces of Quebec and Ontario, which had been united under one legislature since 1840.

[11] A senator may at any time resign his seat, which may also be vacated for non-attendance and certain other causes.

Australia, and South Africa are also specially constructed to represent the states and provinces of those countries as distinct from the population at large. The Senate of the Irish Free State is intended to represent minorities which do not find it easy to obtain spokesmen in a chamber elected under the conditions of party controversy. Even the nominated councils under the older colonial system were representative in the sense that the members were specially selected to represent those elements in the community whose importance was derived from wealth, education, or official position, and the framers of our Constitution evidently expected that the same principle would govern the practice of making nominations to the Senate.

Under the practice which has unfortunately established itself among Canadian statesmen of all parties the Senate of Canada represents nothing at all. It has become a kind of almshouse for retired politicians. If our rulers had followed the principles of selection observed by the older colonial governors, the house might well have been made to represent valuable elements in the life of the community which do not easily find distinct expression through the medium of party politics. Seats might have been bestowed upon men eminent for their services in learning, education, business, and professional activity The advice of such men is constantly being sought in relation to all kinds of non-political affairs, but they are excluded

from the formal councils of the nation by reason of the fact that they have neither the time nor the inclination to work their way along the regular path of political advancement. Unfortunately this opportunity has been neglected, and the power of appointment has been allowed to degenerate into a piece of common political patronage. A seat in the Senate is now almost invariably bestowed upon some supporter of the ministry who wishes to retire from the more active forms of political life. Thus the Senate contains exactly the same type of men as are to be found in the House of Commons, and it represents nothing that is not much better represented in that house. It consists of the same men at a later period of their lives, when they are no longer obliged to keep in touch with the opinion of their constituents. Since membership carries with it a substantial salary the system operates as a kind of non-contributory old-age pension scheme for politicians. There is no reason in principle why pension schemes should not be devised for politicians as well as for any other deserving class of the community, but it seems highly undesirable to endow the pensioners with any special share in legislative power.

For these reasons the Senate of Canada has proved itself to be a very weak body. It rests upon no basis of moral authority which can justify it in measuring its strength with the more popular house. Its members possess no special intellectual or other qualifications to enhance the

value of their judgment upon questions of law and government, while in many cases their advanced age is evidenced by a natural decline in physical and mental vigor. On the other hand, they often display the normal tendency of old men to be obstructive, particularly when the House of Commons contains a majority of a different political color. Since the number of senators is fixed by law, the government is deprived of the valuable reserve weapon possessed by an English ministry, the power to create a sufficient number of new peers to overcome resistance.[12] It therefore happens that a long tenure of office by one party leaves a succeeding ministry of another party to face an irremovable hostile majority in the Senate. For the reasons already indicated the Senate lacks the political strength which would enable it to resist bad legislation on the ground of principle, and it lacks the personal qualities which are required to make its criticism more intellectually valuable or more independent of party politics than that of the other house. At the same time it possesses sufficient power to enable it to harass and obstruct a government with which it is not in political sympathy.

The reader will understand that the foregoing criticisms are expressed only in general terms. No system is so defective that it does not sometimes produce good results, and the Senate of

[12] The Canadian government has the power to create only six senators to meet an emergency.

Canada includes several members who would confer distinction upon any assembly. Should any particular senator chance to do me the honor of reading these lines, I hope that he will deem himself to be included among those to whom I refer.

The Canadian Senate, unlike that of the United States, has no special functions or privileges which it does not share with the House of Commons. By the practice of Parliament the investigation of petitions for divorce presented from applicants in Quebec and Ontario is always entrusted to a committee of the Senate, which usually endeavors to deal with each case as nearly as possible in a judicial manner, and makes a report in which it recommends the action to be taken. This procedure is partly modeled upon that of the British Parliament, but the analogy is imperfect. The House of Lords never entertains a divorce bill until after the facts have been found after trial in a court of law, and the investigation of the bill is always conducted by the judicial members of the House. The Senate committee, on the other hand, hears the evidence itself, and feels at liberty to use a larger measure of discretion than would be possible in a proper court. Attention has often been drawn to the inexpediency of such a practice in a matter where the strict observance of a uniform law is so particularly necessary.

The law requires that senators should be chosen upon a basis of geographical distribution. For

this purpose Canada is divided into four areas, consisting respectively of the Maritime Provinces, Quebec, Ontario, and the four Western Provinces. Each group is entitled to twenty-four senators, who must be residents within the particular district which they are appointed to represent. They must possess a property qualification of at least four thousand dollars.

The United States and Canada have adopted different means of dealing with the settlement of election controversies. According to the doctrine prevailing in England in the eighteenth century each house was the sole and absolute judge of its own membership. The House of Commons decided all questions relating to disputed elections, and these issues were usually decided according to purely party lines without any serious attempt at following a judicial procedure. Unfortunately this rule was copied into the Constitution of the United States, with the result that the decision of these questions has often been dictated by political prejudices. In 1868 the British Parliament wisely delegated the trial of election cases to the courts of law, and this example was followed by Canada within a few years.

In both countries the houses of the legislature have large disciplinary powers over their own members, and can suspend or expel them, if necessary. Each house is the sole judge of the reasons which may induce it to take such a course. In the United States the Constitution provides that a member can only be expelled

upon a two-thirds vote, but in the Canadian Parliament a simple majority is sufficient. Since it is not within the power of either house to impose a disability not known to the law, expulsion does not render a member disqualified for re-election if his constituents still wish him to represent them.

Under the American Constitution, membership of either house of Congress is absolutely incompatible with the tenure of any civil office whatever under the federal government. As we have already seen, this rule operates to exclude the members of the president's cabinet. In Canada the British practice has been followed. Cabinet ministers may, and in actual practice must, be members of one or other house, but no member of the permanent civil service is eligible, and appointment to any post in the public service vacates a seat in the House of Commons. A newly appointed cabinet minister must therefore present himself to his constituents for re-election before he can take his seat in the House. This rule naturally imposes a restriction upon the prime minister in his choice of colleagues; if the state of political feeling is uncertain, he will not appoint a member who is at all likely to be defeated at a bye-election.

The limits of the present essay do not allow me to attempt any picture of the actual course of proceedings in the legislative assemblies. It must suffice to point out the more striking differences which flow from the divergencies in constitutional principle.

The procedure of the Canadian House of Commons, and to a lesser extent that of the Senate, is governed by the fact of the close interdependence of Parliament and the executive. The main responsibility for bringing proposals before Parliament rests with the government of the day, and the ministry therefore becomes in effect the managing committee of the House of Commons. Every large assembly of men must be managed by some comparatively small group, if any business is to be transacted at all, and the principle of our parliamentary government necessarily imposes this duty upon the cabinet. The positive law of the Constitution further provides that no proposal involving either the raising or the spending of public funds can be brought forward except upon the motion of the executive, and an important field of legislative activity is thereby absolutely closed to the enterprise of the private member. Each house appoints several committees to deal with various branches of its work, but all these committees are subordinate in importance to the cabinet, although the latter is not technically a committee of either house and includes members of both. Private members are fully entitled to propose bills upon any subject not involving questions of finance, and these proposals are usually referred to committees for investigation; but no private member can carry any measure unless he secures the consent or at least the friendly neutrality of the government.

In the American Congress, as we have seen, the administration is not directly represented, and it often happens that the majority in one or both houses is politically opposed to the president, who has no means of controlling the proceedings in any way. Nevertheless the House, like all other large bodies, must be governed in practice by some small group, and it therefore follows that in the United States the control has passed into the hands of the managers of the party which happens to be in a majority. This majority nominates the speaker of the House of Representatives, who in many ways exercises the functions which under our practice belong to the "leader of the House," usually the prime minister. The American speaker is avowedly a party leader, whose business it is to assist his party in carrying their proposals through the legislature. The Canadian speaker, though selected from the majority, is expected to assume a judicial attitude upon reaching the chair and to hold an even balance between the various parties in the House.[13] Furthermore under the American system it falls to the party managers to organize the numerous committees in which the real business of the House is transacted. In each committee the majority of the members, and particularly the chairman, belong to the dominant party in the House. Every member of the House has an

[13] In the United States the vice-president is *ex officio* speaker of the Senate. In the Canadian Senate the speaker is appointed by the government from among the members of the house.

equal right to initiate proposals of any nature, but his chance of carrying any project depends upon his securing the co-operation of the committee concerned and of the speaker. The volume of bills nominally presented to Congress is colossal, twenty or thirty thousand being nothing unusual in the course of the two years. The majority of these are attempts on the part of individual members to obtain the expenditure of public money in the localities which they represent. It need hardly be said that only a small percentage of these proposals have any real chance of success, but the student will readily see that the primary task of sifting out this great heap of rubbish in itself imposes a heavy labor upon the committees. The effective control of legislation, which in Canada belongs to the executive government, is therefore vested by the American practice in the speaker and in the chairmen of the more important committees.

All two-chambered systems of government contain within themselves the possibility of a conflict between the two branches of the legislature. In Great Britain, where the House of Lords is permanently Conservative, the frequent recurrence of conflicts during the time of Liberal administrations led to the passing of the Parliament Act of 1911, which provided means by which the House of Commons could make its will prevail against the continued opposition of the House of Lords. The newer constitutions of Australia and South Africa also contain

provisions for avoiding an absolute deadlock between the two houses, and in Ireland the Chamber of Deputies can always overrule the Senate, subject to the right of the Senate to demand a popular referendum upon the question in dispute. In Canada no such arrangements have been made, except that the government has the power of adding six members to the Senate. Before confederation sharp conflicts between the elected assemblies and the nominated councils were very frequent and gravely impeded the progress of legislation. In the Dominion Parliament these clashes were more frequent in the early days of confederation than they are to-day. The legal powers of the Senate are precisely equal to those of the House of Commons, but the Senate is much too weak in moral authority, for the reasons which we have already noticed, to venture upon a serious trial of strength with the elected House. Disputes over legislation are by no means unknown, but they are comparatively infrequent and almost invariably relate to minor questions. In both houses the rules of procedure, following British precedents, provide for the convening of conference committees at which differences of opinion may be adjusted. Upon an important question forming part of the general policy upon which the House of Commons was elected, the Senate would never attempt to resist the decision of the elected assembly.

The American Constitution also contains no provisions for avoiding a deadlock between the

houses, though conferences may be arranged under the rules of procedure. The legal rights of the two houses are on exactly the same footing, and neither can overcome the other, although they may combine to overrule the president by a two-thirds vote. The Senate is chosen by popular election, and therefore possesses an element of moral strength which the Canadian Senate lacks. Furthermore, in entering upon a conflict with the House of Representatives it is not handicapped by the feeling, which must always weigh with the Canadian Senate, that it is opposing the national government in a proposal which that government deems to be necessary for the welfare of the country. More often than not both the American houses are controlled by majorities of the same political color, and in this case occasions for conflict naturally do not often arise. But where they are not in political agreement the progress of legislation is rendered very difficult, for there is nothing in the law or practice of the Constitution which imposes upon the Senate a general duty of submission to the will of the other house upon all major issues.

In both countries the lesser law-making bodies are modeled for the most part after the federal example, but in Canada the principle of two-chambered government has failed to maintain itself in the provinces. Of the nine provinces seven have either discarded their second chambers or have never adopted the institution. Quebec and Nova Scotia have legislative

councils composed of members nominated for life by the provincial government, and these second chambers share the weaknesses of the Dominion Senate. In practice Canada is almost wholly governed on the one-chamber system, since the nominated houses take only a very small share in the actual work of legislation. With regard to financial matters, the legislative councils of Quebec and Nova Scotia are subject to the same restrictions, both legal and conventional, as the federal Senate. The constitution and practice of all the provincial legislatures, which are elected for a maximum term of four years, closely resemble those of the Dominion Parliament. In every case the ministry controls the general course of legislation and is dependent upon the continued support of the elected chamber. All proposals involving the raising or the expenditure of public funds must be brought forward on the initiative of the government, whose members must have seats in the House. Recent political developments in Canada have shown a tendency toward the formation of groups independent of the historic political parties; and the breaking up of a small assembly into three or more groups naturally makes it more difficult for a ministry to rely upon the steady support of a homogeneous majority. Consequently we see indications that the theory of strict and close interdependence between the ministry and the legislature is likely to be modified. The opinion is being expressed that the assembly should have more freedom to

legislate independently of the cabinet, and that a government should not be expected to resign for any adverse vote that does not amount to a direct censure or to a formal withdrawal of confidence.

In the United States the two-chamber system has been everywhere retained. The Senate is invariably chosen by direct popular election, and therefore does not differ in character or outlook from the other house. But it is always less numerous, and therefore its members are chosen by larger constituencies. In most states the senators are elected for a longer term, and the principle has been generally followed that the Senate should not be dissolved as a body, but should only be partially renewed at each election. As in the Federal Constitution, the houses are independent of the executive and of each other, and the control of business therefore falls into the hands of the committees appointed by each house.

This lack of control by a responsible executive is probably the real reason for the stringent restrictions upon legislative activity which are to be found in all the state constitutions. Since the Federal Constitution leaves the general residue of undefined powers with the states, the capacity of a state legislature for good and evil would, in the absence of other limitations, be enormous. Even under the existing system the bulk of legislation turned out by the states is very great, and much of it is very crudely conceived, since the law-making assemblies are

filled for the most part with a very second-rate type of politician. Experience has shown that the members cannot in practice be safely trusted with an unlimited liberty to introduce bills upon any subject which they please, since they are always liable to fall under the influence of selfish interests desiring to secure special favors. The framers of the various constitutions have therefore deemed it wise to place large areas of legislative activity entirely beyond the reach of the elected representatives. Under the Canadian practice it is the duty of the government, not only to initiate the more important measures itself, but to protect the people from the rash experiments and from the selfish intrigues of individual members, who in any country are often tempted to be the mere tools of sectional interests operating secretly outside the legislature. If it fails in this duty, the remedy lies with the people at the next general election. In one very important respect the positive law of Canada protects the public interest by providing that no proposal involving the public funds shall be brought forward except upon the initiative of the responsible government. In America much of the energy of individual members is occupied with attempts to secure votes of public money for the districts which they represent. This leads in practice to what is called "lobbying" and "log-rolling," or, in other words, to all kinds of intrigues within and without the legislative chamber in order to secure the passage of bills designed to promote

private or sectional interests. In many states the constitution attempts to make these practices punishable as crimes, and it is generally true to say that the rigid restrictions on legislation which abound everywhere are chiefly intended to prevent the power of law-making from being perverted for private ends.

The history of provincial politics in Canada is by no means an unspotted record, and many discreditable schemes have been put through from time to time. But in every case the executive cabinet must assume responsibility, and a ministry which is clearly convicted by public opinion of any indefensible subservience to selfish interests will almost certainly be driven out of office.

This distrust of the professional politician is also responsible for the widespread adoption in America of one of the most interesting experiments in political practice, namely "the initiative and referendum." For this there is no room in the Federal Constitution, and such a method of law-making would not only have been physically impossible in America under the conditions of the eighteenth century, but would have been regarded as hopelessly radical and revolutionary by statesmen of the type of Hamilton. There is, however, no legal objection to the adoption of the principle[14] by the several states, and the history of recent years

[14] Its constitutional validity has been challenged in the Supreme Court, but without success.

has made it abundantly clear that the idea has obtained a firm hold on popular opinion over large parts of the country. Broadly speaking, the principle is that of transferring legislative power from the elected assembly to the people at large. The referendum means that a certain percentage of the voters can demand that any act of the legislature must be submitted to a special vote of the people before it can become effective. The initiative goes even further than this, and gives a prescribed number of citizens the right to lay their own bills before the people without consulting the legislature at all. Under these provisions the governor's right of veto is also eliminated. In a few states the popular right of direct legislation is subject to the same constitutional limitations which restrain the legislature, but in most of the states which have adopted this system the people is given a free hand.

Hitherto the experiment has not found much support in the older states. On the Atlantic seaboard it has only been adopted by Maine, and we do not meet it again until we come to Ohio and Michigan. On the other hand we find that it has been adopted by no less than thirteen of the newer states which lie to the west of the Mississippi.

In Canada the principle of the referendum has taken a firm hold in political practice, although for technical reasons it cannot be established as an obligatory mode of legislation. In 1916 the legislature of Manitoba adopted a

statute introducing the initiative and the referendum on lines drawn according to the American model. The Manitoba Court of King's Bench and the Privy Council held the act to be unconstitutional on the ground that it interfered with the office of the lieutenant-governor, that is to say, with the principle of the executive control over legislation. Under the British North America Act the provinces have the right to amend their own constitutions, "except as regards the office of lieutenant-governor," the reason for this restriction being that this officer represents the authority of the Crown, that is to say, the general authority of the nation. As such he is an integral part of the legislature, and the legislature cannot endow with its own powers a new law-making body from which he is wholly excluded.

Notwithstanding this decision there is nothing to prevent the referendum, and the initiative as well, from being adopted as a voluntary means of ascertaining the popular will. In practice the use of the referendum is becoming increasingly common, particularly in connection with such questions as prohibition and liquor control, where legislation closely touches the personal habits of the people.

CHAPTER IV

JUSTICE AND LAW

The political controversies of the seventeenth century in England resulted in establishing the doctrine that the judges should be independent of both the executive and the legislature, that they should hold their offices for life, subject to good behavior, and that they should not be personally accountable to law for their decisions. The acceptance of this theory was hailed as a victory for the cause of liberty, and for this reason the principle was eagerly adopted by the founders of the United States Constitution. In Canada it has been accepted without controversy as a part of the general heritage of British constitutional doctrine.

Notwithstanding this common parentage the actual development of the judiciary has proceeded along different lines in the two countries, and the differences which have appeared are due to the divergent theories underlying the two federations. Since the Canadian system is much the simpler, it will be more convenient to examine it first.

The judiciary of Canada is a single body resting upon the authority of that undivided national sovereignty which is known to lawyers

as "the Crown." It is the organ through which the nation in its sovereign capacity decides all disputes over which it has jurisdiction, unless it entrusts their determination to some other body. The nation may, if it so chooses, empower some other organ of the government to decide any particular class of cases, but there can be no difficulty as to jurisdiction arising out of the claim of any other sovereignty competing with that of the nation itself. For this reason Canada has never known any system of dual judicature such as that which prevails in the United States. Every judicial officer, from the chief justice of Canada to the humblest police magistrate, whether he be appointed by the Dominion or by the province, derives his authority from the Crown, and sits to administer the law of Canada, whether the law in question be Dominion or provincial in its origin. There are many legislatures in Canada, but there is only one body of law. This law may have different rules for different provinces, it may be drawn from the custom of Paris and French commentators, from English statutes and decisions, or from the acts of our own legislative assemblies, but it is all part of the one law of Canada, which it is the duty of every judge to apply in every case that comes before him. It is administered by the sole authority of the Crown, which now means the nation.

This being the general principle, its operation under our federal system is entrusted to various Dominion and provincial authorities. The

provinces have the exclusive right to provide for "the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts" (B. N. A. Act, s. 92). Criminal procedure, with regard to which uniformity was deemed to be desirable, is reserved to the Dominion. The provinces are given the control of "public and reformatory prisons," but penitentiaries are placed under the federal jurisdiction.

All the judges of the superior, district, and county courts in each province are appointed by the Dominion government, being selected in each case from the bar of the province concerned. Their tenure is the same as that of the English judges, that is to say, they hold office for life during good behavior and can only be removed upon an address from both houses of Parliament. Their salaries are a charge upon the revenues of the Dominion. In every province the courts are organized upon substantially the same lines into tribunals of first instance and of appeal respectively. Above all the provincial judiciaries rise the two final appellate courts, namely the Supreme Court of Canada and the Judicial Committee of the Privy Council, the latter sitting in England. The litigant who is dissatisfied with the decision of the highest provincial tribunal has usually the choice of appealing either to the Privy Council or to the Supreme Court of Canada. From the Supreme

Court an appeal lies to the Privy Council by special leave, which will only be granted in exceptional cases where the difficulty or importance of the issue renders it desirable. Leave will almost invariably be refused in cases where the Supreme Court has dismissed an appeal from the provincial tribunal. Under the modern practice the Judicial Committee always includes some judges from Canada and the other Dominions, though it does not necessarily or usually follow that any of these are present at the hearing of a Canadian appeal. There is a considerable difference of opinion in Canada as to the desirability of maintaining the right of appeal in any form, and in many quarters it is felt to be inconsistent with the modern principle of Canadian autonomy. The case for the Privy Council would be considerably strengthened if it were reconstituted on lines which would make it genuinely representative of the Empire as a whole.

The law which the Canadian courts administer in eight provinces is based upon the common law of England, and the decisions of the English courts are in most cases accepted as authoritative. At the same time it must be remembered that in many important matters sweeping changes have been introduced by federal and provincial statutes, and on the whole the tendency of the law of Canada is to diverge further and further from that of England. In Quebec the main body of the law is based upon that of France, and the distinctive character of the

Quebec law is warmly maintained by the legal tradition and the public opinion of the province. It rests in the first instance upon the Quebec Act of 1774, and is safeguarded by the proviso in the Constitution which gives to each province exclusive jurisdiction over questions of "property and civil rights." In 1866 the greater part of the Quebec private law was embodied in a civil code closely modeled upon that of Napoleon, but borrowing many features, particularly in commercial matters, from English sources. The criminal law and procedure are contained in a Dominion code, and are wholly English in character, though some of the more complicated distinctions of the old English law have been swept away.

There has never been any demand in Canada for the introduction of the system of choosing judges by popular election for a term of years, which has now been almost universally adopted in the constitutions of the various American states. About the comparative merits of the two methods there has been much controversy. The truth would seem to be that either system is capable of giving excellent results, if it is operated in the right spirit, and neither will produce the best kind of judges if improper and irrelevant considerations are permitted to influence the choice. Canada, like Great Britain, has suffered deeply and continues to suffer from the vicious theory that the high privilege and responsibility of appointing to the judicial bench is to be regarded partly as a piece of

political patronage to be used for the rewarding of political supporters. The fact that we are fortunate enough to have many judges of distinguished learning and ability cannot conceal the unpleasant truth that many men now on the bench obviously lack the special qualifications for their high office, and have only been appointed by reason of the political services which they have rendered to the government of the day. The practical evils of the system are somewhat mitigated by the strong professional tradition which requires a judge to leave his politics behind when he goes on the bench and permanently excludes him from every kind of political activity. In personal integrity and impartiality in the discharge of their duties the Canadian judges are fully equal to those of any other country, but this does not entirely compensate for the fact that many of them are intellectually commonplace and insufficiently learned in the law. We may be thankful for the honesty of our judges, but the law would be better administered if this honesty were less heavily diluted with mediocrity.

The practice of treating judgeships as rewards for political services is censured by all respectable opinion and was specially condemned by the Canadian Bar Association at its Vancouver meeting in 1922. If an apology is needed for referring to the matter in this place, I would only say that it seems to be the duty of any student of political science, however insignificant, to use whatever influence he may possess in

strengthening the general protest against this unnecessary and indefensible abuse. In England there has been a notable improvement since Lord Loreburn came to the chancellorship in 1906. Notwithstanding a storm of obloquy from politicians of the lower type, Lord Loreburn proceeded steadily on the theory that judicial appointments should be governed solely by considerations of merit, and the principle has since been generally followed, exception being made in the case of one or two particular plums, which are still reserved for the politicians. The Canadian minister of justice who first has the courage definitely to break away from this evil tradition will acquire a reputation for constructive statesmanship far outweighing any advantages which he may expect to gain from the venal gratitude of political supporters.

The legal profession in Canada is provincially organized. In each province there is an incorporated bar society, which has absolute control over the training and admission of aspirants for the bar. It also exercises discipline over unworthy members of the profession, and can expel an offender from practice, subject to his right of appeal to the courts. The qualifications prescribed for admission are fairly substantial, and the country is not overrun with nominally qualified lawyers to the same degree as the United States. The real weaknesses of legal education in Canada are due, partly to the narrowly provincial spirit in which the bar regulations are framed, and partly to an

inadequate appreciation of the value of scientific study under academic conditions. In varying degrees most of the provincial bar societies combine to penalize the student who desires to study outside his own province, with the result that in many cases the provincial law schools are scarcely more than dependencies of the local bar organization, and much of the instruction provided is little more than supplementary lecturing for young clerks who spend the greater part of their day in offices. Under these conditions it is not surprising to find that the level of legal scholarship in Canada is very low, and that the national contribution to the science and literature of jurisprudence is almost insignificant. The efforts which are being made in various quarters to improve this state of things have to overcome a formidable mass of dead-weight opposition from the less progressive elements in the profession.

As we have already noticed, the chief responsibility for the administration of the criminal law rests with the attorney-general of each province, although the law itself is embodied in a Dominion Code. The police force is for the most part organized under provincial or municipal authority. The wilder parts of Canada are policed by the highly efficient semi-military force known throughout most of its history as the Royal Northwest Mounted Police. More recently the name has been changed to the Royal Canadian Mounted Police, and the force now discharges certain duties in the settled provinces.

In general the administration of criminal justice throughout the Dominion is as swift and certain as reasonably can be expected, and the terms of the code give but little opportunity to ingenious lawyers to obstruct the course of the law by elaborate appeals based upon purely technical grounds. For this reason even the wildest regions of Canada are free from those discreditable outbursts of mob violence and lynching which frequently occur in the less developed states of the American Union. Since all officers of the law act under the same authority the arrest of a criminal who has escaped from one province to another is not hampered by any special formalities corresponding to the American system of interstate extradition. The original warrant is sufficient when it has been endorsed by the local magistrate, since the process of the criminal courts runs uniformly throughout the whole of Canada.

The Canadian courts, like those of the United States, are the appointed guardians of the Constitution, but the British North America Act offers a much more limited scope for judicial interpretation than does the Constitution of the United States. We have already noticed many of the more important differences between these two instruments, but there is one difference which does not appear in black and white, and it is perhaps the most vital of them all. The Constitution of the United States is meant to be read literally, and the British North America Act is not. Of this essential doctrine there is

only one hint to be found in the actual text of the statute, and that is the statement in the preamble that the Constitution of the Dominion is to be "similar in principle to that of the United Kingdom." Under the cover of these words there has been imported into Canada the whole system of conventional understandings whereby the practice of a modern democracy finds its expression in the legal forms of the old monarchy. When the United States Constitution confers upon the president any special function, such as the right of veto, it means that he shall exercise it upon his own personal discretion. When our Constitution says that the governor-general may do something, what it means is that the Dominion cabinet is to make the decision, and that the governor-general is to sign the necessary documents. If His Excellency, advised by a council of his own choice, were to experiment for a few days in the actual exercise of the powers which the law confers upon him, he would speedily find that he was without a ministry at Ottawa and with a telegram of recall upon his table. In other words, the British North America Act is written, as it were, in a secret code, the key to which is to be found in an accurate knowledge of British political practice during the last hundred years.

It is hardly necessary to point out that this part of the Canadian Constitution can never form the subject of litigation in a court of law. The courts can only interpret the statute, and for them it must mean exactly what it says.

To take an extreme example, if the Dominion government were to disallow every act that the legislature of Manitoba had passed in the previous twelve months, the courts would be bound to hold such action perfectly valid, although constitutional practice would condem it as an intolerable invasion of provincial rights. Similarly the delicate question of the relations of Canada and Great Britain is governed entirely by an informal understanding. Those relations have changed profoundly since 1867, and the change is indicated in many points of executive practice,[1] but nothing of this appears in the text of the law. For these reasons we must recognize that a very large part of the Canadian Constitution — perhaps the most important part — lies entirely beyond the power of judicial definition.

It is also true that even within the realm of strict law, the function of the courts in interpreting the Constitution is much more limited in Canada than it is in the United States. With the exception of certain difficulties concerning proprietary right, we find that in practice only one constitutional question ever comes before the Canadian courts, and that is the question of the distribution of legislative power between the Dominion and the provinces. Does the subject-matter of a particular statute fall within the class of subjects exclusively entrusted to

[1] As, for example, the changed instructions issued to the governor-general since 1878.

the provinces, or does it not? If it does not, the province is incompetent and the Dominion is competent in that respect. There is, of course, a difficult borderland where the two jurisdictions appear to overlap, and for the determination of these border cases the Privy Council has laid down certain rules too technical for discussion within the limits of this essay. But no Canadian statute, whether Dominion or provincial, can ever be declared invalid on the ground that it violates some principle which the Constitution has protected from all legislative interference. No court can annul a statute merely because, for example, it infringes the right of trial by jury, or deprives a man of his property without due process of law, or transgresses against some of the innumerable prohibitions contained in the various American state constitutions. Within the area allotted or reserved to it every Canadian legislature is a complete expression of the national sovereignty.

On the other hand Canada has committed to her judiciary one important function which the Supreme Court of the United States has expressly declined to assume. In 1793 Washington sought to obtain the opinion of the Supreme Court upon certain questions of difficulty, but the judges respectfully declined to express an opinion upon any issue not arising in the course of litigation. In Canada the Supreme Court at Ottawa is empowered and required by statute to act as an adviser of the government and the

legislature.[2] That is to say, if the ministers feel doubtful about the validity of any federal or provincial legislation, even before it becomes effective, they are entitled to submit the question of its validity to the Supreme Court for determination. The Court may then use its discretion in determining what parties are entitled to be heard upon the issue, and it delivers a reasoned opinion in the same way as if the question arose in ordinary litigation. Appeal lies to the Privy Council in the usual way. The object of this procedure is to prevent the risk and cost of determining constitutional questions being thrown entirely upon private individuals in the course of litigation regarding private rights. Where no such provision is made, the only means of testing the validity of any law is to break it and see what happens.

In all cases involving the validity of statutes, whether they arise under the reference procedure or in the course of ordinary litigation, the attorney-general of the Dominion or of the province concerned is entitled to intervene on behalf of the government which he represents.

When we turn to examine the judiciary of the United States we are met at once with a striking illustration of that principle of dual sovereignty which lies at the basis of all American institutions. The application of this principle to the

[2] Canadian practice rests upon s. 60 of the Supreme Court Act (Rev. St., c. 139), not upon the Constitution. There are provincial statutes to the same effect. Provisions of a similar character are to be found in a few of the American state constitutions.

judicial system has produced a large body of technical law of the most intricate and difficult character, and the reader will understand that nothing is possible in these pages save the briefest indication of the general theory.

In Canada there is, strictly speaking, no such thing as either a federal or a provincial court. Every tribunal in the land, whether the judge is appointed by the Dominion or by the province, is a court of the Crown in Canada and has jurisdiction over all such matters as may be entrusted to it either by federal or by provincial statutes. In the United States, on the other hand, every court sits under either federal or state authority, but never under both. The causes over which it has jurisdiction are those which Congress or the state legislature may respectively be competent to commit to it, and no others. In the great majority of cases the decisions of the highest tribunals in each state are final and without appeal. Even the Supreme Court of the United States has no jurisdiction except in those cases specified by the Federal Constitution and statutes made by Congress in pursuance thereof. The most important classes of cases committed to the federal courts are those in which constitutional questions and questions arising under federal statutes are involved, and cases in which the parties belong to different states. Unless the case is one falling under the federal jurisdiction, the state courts are supreme, nor are they bound to govern their judgments by previous rulings of the federal tribunals. From this it

naturally follows that upon many questions there are a number of inconsistent final decisions in the courts of different states, and there is no common tribunal superior to them all which is in a position to lay down a uniform rule. In Canada, on the other hand, any decision of the Supreme Court or the Privy Council must be accepted as authoritative throughout the Dominion, unless it turns upon some local statute or upon some point in which the law of Quebec differs from that of the other provinces. The reader will therefore easily understand that the general character of American law is one of extreme complexity, and there is probably no body of civilized law which presents greater intellectual difficulty to the student and to the practitioner. In fact it is scarcely accurate to speak of any such thing as "American law." There are a large number of federal statutes and an enormous number of federal decisions rendered upon cases that have come before the courts of the United States. But the statutes are restricted to certain specified matters, and the decisions are for the most part only binding upon the inferior federal courts and not upon the state tribunals.

So far as this very intricate situation can be summarized in a sentence, we may say that in Canada there is one body of national law subject to provincial variations, whereas in the United States there are forty-eight distinct bodies of state law together with a limited amount of common law relating to certain specified matters.

All federal judges are appointed by the president with the approval of the Senate. They hold office for life and their salaries are irreducible during their term of office, but they can be removed from office by the Senate on impeachment by the House of Representatives. In the history of the country three inferior judges have been so removed, the last instance being in 1913. The only example of an attack by impeachment upon a Supreme Court judge was that of Samuel Chase, who was accused in 1804. The impeachment, which was due to politica motives, was fortunately unsuccessful.

Below the Supreme Court there are nine circuit courts of appeal, each dealing with a large area of the country known as a "circuit." Each of these circuits is again divided into a number of smaller areas known as "districts," in which courts are held by a district judge sitting alone. Thus the organization of the federal courts is designed to cover the whole country, the result being that there is a complete system of federal judicature independent of and parallel to the system of state courts.

On the administrative side there is again a complete federal system. At the head of this stands the Department of Justice, presided over by the attorney-general, who is responsible only to the president. Under the department there are a large number of "district attorneys," whose duty it is to take charge of the enforcement of federal rights within their respective areas. The minor executive officers subject to

them are called "marshals," and these with their assistants or deputies form the only police force at the disposal of the national government. It is not, as would be the case in Canada, the duty of state officers to enforce the federal laws.

Politics inevitably exercise a certain amount of influence upon appointments to the federal bench, with the result that the judiciary includes a number of very second-rate men, though examples of willful misconduct on the part of federal judges have been extremely rare. In the case of the Supreme Court the traditions of the tribunal and the pressure of public opinion have always been strong enough to ensure that only lawyers of real ability should be appointed. At the same time the enormous political powers vested in the Supreme Court have often tempted the president to appoint men whose political sympathies will lead them to take a definite side on certain vexed questions. For example, after the death of Marshall in 1835 Jackson and his successors continued to staff the court with judges sympathetic to the doctrine of "State Rights." The famous Dred Scott decision of 1857 was recognized on all sides as having been obviously inspired by the political leanings of the Southern judges who formed the majority of the tribunal. Again the legal tender controversy of a later date drew from the Supreme Court two contradictory decisions in 1870 and 1871, the judges in each case being divided upon party lines.

We have become so accustomed to the spectacle of the Supreme Court deciding upon the validity of federal and state laws that the reader unacquainted with American history tends to assume that this tremendous power is expressly conferred upon the court by the Constitution. As a matter of fact the Constitution is silent upon the point. The power was first asserted by the court under Marshall's presidency in 1804, and its exercise aroused a vigorous controversy. For many years it was strenuously maintained that the president and Congress were respectively entitled to judge the extent of their own powers under the Constitution, and Jackson even openly encouraged the state of Georgia in its successful resistance to the decrees of the Supreme Court. Even in modern times particular decisions have given rise to violent political attacks upon the power claimed by the Supreme Court, though no party any longer claims that either Congress or the president is entitled to disregard its rulings.

It may well be questioned whether the policy initiated by Marshall has not in the course of time thrown upon the Supreme Court a burden greater than any purely judicial body should be called upon to bear. Many of the most important issues which arise for decision are really not questions of law at all, but problems of politics and economics vitally affecting the whole life of the nation. Some of them could hardly have been foreseen a hundred years ago. The decisions handed down in such cases are seldom

unanimous, and it has often happened that the judges have been divided along the lines of their political sympathies, with the result that the whole nation feels the decision to be political rather than judicial in its nature. On general principles it would seem more desirable that questions which are really political should be decided by bodies that are political in character.

Under the Canadian system, which practically restricts the judiciary to determining questions of the distribution of legislative power, the decisions of the courts have never become the subject of serious political controversy.

When we turn to examine the judicial organization of the several states, we find ourselves at once faced with a new principle. Broadly speaking, we recognize here the difference between the ideas of the eighteenth century and those of the nineteenth. The states began with the idea that the judges should be appointed by the governor, usually with the concurrence of the council or the legislature. This was substantially the principle of the Federal Constitution, though the state legislatures often permitted themselves to indulge in a much greater freedom of interference with the practice of the courts than Congress ever attempted. In the first half of the nineteenth century the whole country was swept by a wave of what was called "democracy," and by a curious confusion of thought the word was apparently identified with the system of popular election. At the present day it is hardly necessary to point

out that popular election is merely one of many means by which the democratic principle may be carried into effect and its suitability to such a purpose varies with the circumstances of each particular case. Nevertheless the democratic theory has brought it about that in nearly all the states the judges are now chosen by direct popular vote and hold office for a term of years, which in some cases is scarcely sufficient to safeguard the dignity and independence of their position. For the highest courts the periods vary from two years in Vermont to fourteen years in New York and twenty-one in Pennsylvania. In New Hampshire, by a rule dating from 1793, the judges of the final court hold office during good behavior. The provisions for the removal of judges vary widely from state to state, but in no instance do they hold office at the pleasure of the executive.

About the comparative merits of the appointive and elective systems of choosing judges there has been and will probably continue to be much controversy. The question is one on which each community must be deemed to be the best judge of its own interests. We know by experience that political motives may dominate the choice under either system, and the only chance of eliminating this evil is to place the patronage in the hands of some permanent and semi-judicial body as far as possible removed from political associations. In some American states the bar exercises its influence to this end with valuable results.

At bottom the two methods rest upon different theories as to the nature of the judicial office. According to one view the judge should be an expert chosen for his special knowledge and technical skill, and as far removed as possible from all connection with any sectional interests in the community. As between rich and poor, employers and labor, one party and another, he should be entirely indifferent. He should represent nothing save the state in its most impersonal and abstract conception. That is to say, he should not seek to represent the people in the sense of the majority of the electorate, but only the ideal of abstract justice which the community is united to express. It may prove in certain cases to be as much his duty to resist the popular will as it is in other cases to enforce it. Upon this theory it is as unreasonable to choose a judge by popular vote as it would be to elect a consulting engineer. The right of appointment must necessarily be vested in an individual or in a small group of persons who are able to estimate the personal qualifications of each candidate. The theory assumes that such persons will feel a due sense of their responsibility in making an appointment of such consequence. When an executive officer appoints a judge for political reasons, he is defying the only principle upon which he can properly be entrusted with the high duty of selection.

According to the opposing doctrine a judge is primarily a representative of the people for

the performance of certain duties which they cannot conveniently discharge themselves. He must be as closely as possible associated with the people in order that he may share their sentiment and decide causes in the same way as they would do themselves if they could give the necessary time and attention to such matters. If the interest of the people clashes with that of an individual or a section, he should be on the side of the people. He should only hold office for a short term in order that he may not forget the source from which his power is derived and the duty which he owes to his master. That is the so-called "democratic" theory, which, like its opponent, is never realized in practice. Just as the principle of the appointive method is defied by the statesman who regards his trust as a piece of political patronage, so the principle of the elective method is defeated by the professional party managers who take the real selection out of the hands of the people and use it for their own ends. In practice the elective system works best when the bar is sufficiently strong to control the professional politicians and to place its own nominees upon the bench. In other words, the best results are reached when the sovereign people has sufficient humility and self-control to realize that it is unsuited to the task of selection and to leave the real power of appointment in the hands of experts.

In this connection it should be remembered that a reason for the elective system is present

in the American states which is absent in Canada. The great majority of the state constitutions appear to have been framed upon the theory that the legislature is a tricky horse which must be ridden on the curb by a watchful people, and is always liable to bolt if the strong hand is relaxed. The people manifestly do not trust their lawgivers, and they have therefore loaded all their constitutions with prohibitions intended to prevent the legislature from doing most of the things which it would normally wish to do. The legislature is like a servant who is not entrusted with the keys of the cellar or the garage, for fear lest he might help himself and accommodate his friends. Now one of the main functions of the judge in an American state is to keep an eye upon the legislature. The people cannot do this themselves, and he must discharge this duty on their behalf. As between the people and the legislature he is the representative of the people, and it therefore follows that he should be chosen by and responsible to them. To this there is no parallel in Canada. Within the area of its competence every legislature is deemed to be the complete expression of the popular sovereignty. If it fails to carry out the people's will, the remedy lies in the political process of an election and not in the courts of law.

On the administrative side every state has its own attorney-general, together with a number of local prosecuting attorneys, who are usually elected by popular vote. Most of the cities

have an adequate police force, but the country districts are often unprovided, and in some of the less settled states the enforcement of the criminal law is very seriously defective

The law of the states is generally founded upon the common law of England. Louisiana has a civil code based upon the civil law of France, but the civil law tradition is much weaker in Louisiana than it is in Quebec. Traces of Spanish law are to be found in some other states. The criminal law is a matter of state competence, and in some states it has been codified. Procedure, both civil and criminal, varies very greatly. The more progressive states have adopted codes of procedure framed along modern lines, but many still retain the main features of the cumbrous medieval English procedure which has now been abolished everywhere throughout the Empire. So far as an outsider can judge, procedure everywhere, especially in criminal cases, appears to be far more complex and intricate than in Canada. An ingenious lawyer usually finds it easy to delay the progress of a case by multiplying appeals and dilatory motions, and the decision of an issue on the merits may often be delayed for years by technicalities which a simpler system of procedure would eliminate. Conflicts of jurisdiction between federal and state courts, or between courts of law and courts of equity, often serve to increase the complexity of a system which is already too intricate. A movement is now on foot among many of the

leading lawyers to procure the enactment of a uniform and simple system of procedure throughout the country. It is much to be hoped that this movement will gather strength, but the state legislatures, which are often dominated by lawyers of an inferior type, are not very quick to respond to suggestions coming from the leaders of the profession.

The jealousy shown by the people towards their legislatures sometimes extends itself to the judges, and in certain states the functions of the judges are restricted by provisions which seem to be intended rather as expressions of "democratic" theory than as means for facilitating the administration of justice. For example, several constitutions provide that the judge shall not be allowed to direct the jury upon matters of fact, but must confine himself to stating the law. A few states have even gone so far as to apply the practice of the "recall" to members of the judiciary. Where this rule exists, a judge is not only elected, but holds his office absolutely at the mercy of the electorate, who may dismiss him at any time, subject only to due compliance with the prescribed procedure. It may be that in practice these extreme measures are not likely to be applied to the judges, but the presence of such provisions in the constitution would seem to indicate a somewhat low view of the nature of the judicial office.

The development of the bar in the United States has been marked by features peculiar

to the country.[3] The English practice, which has been more or less reproduced in Canada, regarded the bar as an autonomous and closely limited learned profession, completely controlling all admission to its own ranks. In opposition to this theory there was developed in America the doctrine that the practice of law is a part of public life, and that it is one of the inherent rights of man in a democracy to be enabled to take what part he pleases in public affairs. The first half-century of independence was therefore marked by a widespread attack upon the principle that the duties of a lawyer were such as to demand special educational and technical qualifications. Several states passed legislation abolishing all such tests, and in the case of Indiana the extreme democratic doctrine was actually embodied in the text of the constitution, where it still remains. The situation appears to have been viewed almost entirely from the point of view of the individual desiring to practice, and no sufficient attention was paid to the argument that the interests of the public can only be safeguarded by the imposition of tests which will exclude unqualified persons from the exercise of functions requiring technical knowledge.

Although the extreme theories of the early nineteenth century are no longer maintained by thinking men, they have left their mark

[3] For the facts noted in the following paragraphs I am chiefly indebted to the Carnegie Report on "Training for the Public Profession of the Law," prepared by Mr. A. Z. Reed, and published in 1921.

upon the organization and character of the American bar at the present day. In no case does the profession control admission to its own ranks, and in the great majority of states the standards imposed by public authority are very low. The consequence is that the country is flooded by an enormous number of nominally qualified lawyers. At the present time statistics show that there is approximately one lawyer for every eight hundred and fifty persons in the whole population. In Canada, though the requirements might well be made more severe than they are, the proportion stands at about one for every one thousand eight hundred. Recent years have been marked by a general tendency in both countries to raise the standards of admission, and the American Bar Association has recently advised that two years of general college work and three years of technical study should be required of all candidates for practice.

Whatever political theorists may say, the fact remains that education and technical training are necessary to make a good lawyer, and in the United States the damage done to the profession, and consequently to the public, by political doctrinaires has been largely made good by independent educational effort. In no country in the world is legal education more thorough and scholarly, and the same time more practical, than it is in the best university law schools of the United States. To this excellence the insignificant character of the bar examinations has directly contributed. If the bar

requirements had been more serious, some co-operation would have developed, as it has in Canada, between the universities and the official examining bodies, and any such connection would almost certainly have hampered the free growth of the schools. Since, however, the majority of the state examinations have been of a character with which no university could concern itself, the serious work of professional education has been left to develop independently in the hands of its own experts. Consequently the members of the bar in the United States fall into two main classes. There is an intellectual aristocracy consisting of well-educated and carefully trained men who have passed through the great law schools, and a much larger class of inferior practitioners, usually men of little education, who have been content to comply with the easy tests demanded by the state authorities. For the preparation of such men there exists a large number of law schools of a very inferior type, usually conducted upon purely commercial lines. In consequence of this double standard it would probably be true to say that the United States contains the best lawyers in the world and also the worst.

In closing this chapter a word of general comment may be permissible. The dual judicature of the United States is the most striking illustration of the theory upon which the whole Union rests. So far as my own knowledge goes, it is unique in the world. The reasons for establishing it, such as they were, have long

since passed away. If the Constitution as a whole were to be rewritten at the present day, it is almost inconceivable that this feature would be preserved. The historical reasons for its institution are intelligible, and in 1787 they were necessarily decisive. No state at that period would have consented to surrender its own judicial system, and at the same time no state would have believed that its own citizens could obtain equal justice in the courts of another. Similarly the federal government could not have trusted the state courts to administer federal and state laws with an impartial mind. Two complete and parallel systems therefore had to be created in order to meet both points of view. When the Australian Commonwealth was formed more than a hundred years later, the general lines of the scheme were drawn in deliberate imitation of the structure of the United States Constitution, but there was no attempt to reproduce the dual judicature. State jealousies were strong in Australia, and the states determined to retain the control of their own courts and the appointment of the judges. But it was never suggested that there should be a second system of commonwealth courts extending through the whole continent and competing for jurisdiction with the courts of the states. To the commonwealth was entrusted only the general court of appeal. Australia, like Canada, has acted upon the principle that all courts should exercise the full judicial authority of the nation and should administer

all laws alike. Whether the United States will ever remodel her Constitution in recognition of the passing of old enmities remains to be seen. The process of amendment is so complicated and the changes involved would be so far-reaching that no statesman of our time is very likely to attempt it. Yet it is undeniable that in the increased cost of justice and in the grave loss of judicial efficiency that flows from the conflict of jurisdictions the nation pays heavily for retaining in the twentieth century an institution based upon the petty jealousies of the eighteenth.

CHAPTER V

THE PUBLIC PURSE

The public finance of Canada is still conducted upon the same principle to which our parliamentary system owed its birth nearly seven centuries ago. The theory established in the latter half of the thirteenth century was that if the king needed money for the service of the nation, he had to ask for it from the representatives of the people, who would have to pay it. Historically, the control of public supply, rather than the making of laws, may be regarded as the primary function of Parliament. In the early part of the eighteenth century the House of Commons adopted standing orders by which it resolved that it would decline to consider any proposals involving the expenditure of public money unless they were recommended by a responsible minister of the Crown. This principle was copied into the British North America Act of 1867 and governs the whole system of public finance in Canada. It is not the function of the legislature to initiate the expenditure of public money, but rather on behalf of the people to control the government in its schemes for raising and spending the wealth of the nation.

It does not appear that this principle was ever fully appreciated by the acute minds which

framed the Constitution of the United States, and the failure to realize it has resulted in the establishment of a system which all competent American observers seem to be agreed in condemning. In No. 30 of *The Federalist* Hamilton quite truly laid down the maxim that "the federal government must of necessity be invested with an unqualified power of taxation in the ordinary modes." Unfortunately the phrase is ambiguous, since the Constitution divides the functions of government among different agencies and in the matter of taxation it throws the whole power and responsibility upon Congress, without reserving to the president any special right of initiative or control. In the House of Representatives the national executive is merely one of many competitors for its share of the national wealth. If the postmaster-general decides that an extension of his offices in New York is necessary for the efficient dispatch of public business, his request for funds has to compete with the proposal of some obscure congressman who wants to win favor with his constituents by procuring the building of an unnecessary marble post-office in some remote town of Texas or California. Furthermore the various departments of government have to compete with one another. The postmaster-general has to struggle with his colleagues of the Army and the Navy for his portion of the public funds. None of these high officials is allowed to appear on the floor of the House to explain and defend the estimates put forward by his

department, and the legislature, although it has no responsibility for administrative efficiency, uses its own discretion in amending the appropriation bills. The real decision rests with the Committee on Appropriations, which may be controlled by interests wholly unsympathetic to the executive government. Furthermore, even this committee has no power to supervise the whole field of public expenditure. If Mr. X. Y. brings in a bill to provide for the erection of a new post-office in Gopher Prairie, this bill will be referred to the Committee on Public Buildings and Grounds. A bill to establish a fish-hatchery at the federal expense will similarly be referred to the Committee on Merchant Marine and Fisheries. All the committees have equal rights of competition in the great game which is known in political slang "as getting pork out of the public pork barrel."

In offering any adverse criticism upon the institutions of another country a careful foreign observer is usually restrained by the reflections that features which appear to him indefensible may perhaps be justified by special local conditions which he has failed to appreciate. Considerations of courtesy and humility alike impose a certain diffidence of judgment. In the present instance, however, American critics seem to be agreed in thinking that the public expenditure of the United States is controlled on wrong principles. In recent years the problem has occupied the attention of Congress, and opinion seems to be moving in favor of a

more business-like system, but up to the present no effective measure for the co-ordination of financial control has yet been adopted. Unquestionably the present system is financially wasteful and tends to demoralize the character of Congress. Historically considered, the error would appear to be due, partly to a misunderstanding of the traditional relation of Parliament to finance, and partly to the unfortunate obsession of the dogma of the "separation of powers." Public opinion at the end of the eighteenth century seems to have been much more concerned with the imaginary dangers of encroachment on personal and state liberty than with the urgent practical necessity of organizing a government upon sound principles of administrative efficiency. The state governments of the period were extravagant and inefficient to a degree which to-day would hardly be tolerated in Central Asia. Their finance was dishonest and their credit worthless, but public opinion condoned the scandal and seems to have been indifferent to the whole problem of efficient government. If the national attention could have been diverted in some degree from the abstract to the concrete, we might have heard less of the separation of powers and more of their co-ordination. The "separation of powers," in spite of its continued repetition in the state constitutions, is nothing more than an abstract dogma which would immediately destroy any country that attempted to enforce it with logical completeness. On the other hand, the

co-ordination of powers is an essential element of the efficiency of any institution, political or commercial. The principle of democracy is fully consistent with the practice of sound government, but in the history of American politics it has often happened that the requirements of administrative efficiency have been subordinated to the demands of abstract political dogma.[1]

The practice of Congress is also defective in that it provides no effective liaison between the two main departments of financial policy, that is to say, between the raising of revenue and its expenditure. On all the ordinary principles of sound business administration both these problems should be envisaged by the same mind. The question "what must I spend?" is logically inseparable from the question "how am I to find the money?" Under the Canadian parliamentary system the minister of finance is charged with the responsibility of finding an answer to both of these questions. The function of the House of Commons is to satisfy itself, on behalf of the nation at large, that he has solved both these problems in accordance with sound principles of political and financial administration. All the departmental estimates have to pass through his office, and it is his business to see that they are not disproportionate either to the needs or to the resources of the country. Having done so, he takes the estimates to the

[1] This matter is further discussed in the last chapter.

House of Commons and lays them before Parliament on the responsibility of himself and the whole cabinet. If the House of Commons refuses to sanction either the means of raising the revenue or the objects of its expenditure, that decision raises a political issue between the House and the ministry which involves either a resignation of the cabinet or an appeal to the country, or both. In the last resort it is the function of the people voting in a general election to pass judgment upon the financial policy of the government.

In the United States the procedure of Congress has placed the effective control over revenue and expenditure in the hands of different committees subject to no real common authority. The raising of the national revenue is a question for the Committee on Ways and Means. The most important demands for expenditure are investigated by the Committee on Appropriations, but it is equally competent for any other committee to propose the expenditure of public money for the objects in which it is interested. The competition of the various committees for the ear of the House is controlled by the Committee on Rules, which consequently enjoys a position of considerable power. But neither this nor any other committee is charged with the duty of reviewing the financial situation as a whole and harmonizing the different branches of financial policy.

The American practice is further complicated by the fact that the law and custom of the

Constitution permit the Senate to take an active part in questions of national finance. The text of the Constitution says that "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." The Senate is also quite at liberty to initiate a bill involving public expenditure. Like most of the provisions in the same document, these rules have been acted upon quite literally in the practice of politics, and the Senate has never acquiesced in any conventional restriction of its legal powers. The consequence is that financial proposals which have at last emerged from the House of Representatives have still to run the gauntlet of a complete re-examination in the Senate. In the course of this overhauling the bill may even be altered in fundamentals so that in the end it is based upon an entirely different principle from that adopted in the other house. If this happens there will probably be a conference between the two houses and much wrangling and negotiation will result. In the last resort victory will lie with the party which knows itself to be politically stronger with regard to the question involved, unless, as frequently happens, the discussions end in the adoption of a compromise measure resting upon no clear principle at all.

The Canadian practice has really resulted in the adoption of a one-chamber legislature for the consideration of all financial questions. The legal powers of the two houses are exactly the

same, except that all proposals involving either the raising or the spending of public money must originate in the House of Commons and be introduced by the government. But in matters of finance the revisory powers of the Canadian Senate are practically obsolete. In part this is due to a deliberate following of the precedents set in England by the House of Lords, and in part to that consciousness of its own political weakness which is necessarily always present to the mind of a non-representative body. The American Senate, resting as it does upon direct popular election and unhampered by English precedents, steps forth with unhesitating confidence to the full exercise of the powers with which it is invested by the text of the Constitution. But it cannot be said that this dissipation of responsibility among many bodies makes for efficiency of financial administration. It may be true that in the multitude of counsellors there is wisdom. But it cannot be said that in the conflict of powers there is either sureness or strength.

In both federations the federal revenue rests mainly upon the duties of customs and excise, and in both the character of the tariff has been an unfailing topic of political controversy. The taxing powers of the Parliament of Canada are practically unlimited. It cannot tax the property of a province nor (probably) could it raise any money for expenditure upon any purely provincial purpose. Subject to these restrictions it can tax any persons or any property

in any way for any object. In the United States the Congress has the right to impose both direct and indirect taxes, but the former are subject to the important qualification that they must only be levied in proportion to the population of each state. This meant in practice that a uniform capitation tax was the only mode of direct taxation open to the federal power, and the Supreme Court held in 1896 that it was beyond the competence of Congress to impose a graduated income tax. The inconvenience of this disability under modern conditions was so great that the state legislatures were induced to accept the Sixteenth Amendment (1913), which armed Congress with the necessary competence.

The doctrine of dualism in the United States Constitution has produced another limitation upon the taxing power. Since both the federal and state governments are entitled to the unhampered exercise of their respective rights, it follows that neither government is allowed, under the guise of taxation, to interfere with the proper activities of the other. This principle is known in the technical language of lawyers as the immunity of instrumentalities. It was first applied in 1819, when the Supreme Court under Marshall prohibited the state of Maryland from taxing the operations of a bank incorporated under federal law. Many years later the same doctrine was successfully invoked to prevent Congress from taxing the salary of a Massachusetts judge. The Sixteenth Amendment

now permits Congress to tax all incomes "from whatever source derived," but in respect to every other kind of taxation the principle of these decisions still holds good. Attempts have been made, but without success, to induce the courts to graft similar limitations upon the taxing powers of the Dominion Parliament in Canada.

The theory of the United States Constitution leaves to the several states all powers of taxation which are not expressly taken away by that instrument. They are forbidden to impose import and export duties or tonnage dues, but with these limitations they have practically a free hand, so long as they do not attempt to interfere with the functions of the federal government and its officers. That is to say, they are left free so far as any limits imposed by the Federal Constitution are concerned. There are, in fact, many more restrictions upon the taxing activity of the state legislatures, but these all flow from their own people, and are further evidences of the widespread distrust with which the American people almost universally regard the ambitions of their representative law-makers. This distrust is based upon bitter experience. The general worship of the abstract doctrine of the separation of powers has led to the same unbusinesslike methods of financial administration in the states as it has produced at Washington. The state executive has usually no control over or responsibility for the financial policy of the legislature, with the result that in

the states there is the same unseemly scramble for "getting pork out of the pork barrel" as there is in Congress. In financial matters the early history of most states is for the most part an unedifying record of one scandal after another. In 1798 the cause of public dishonesty succeeded in obtaining a kind of national charter by the passage of the Eleventh Amendment to the Constitution, which protected the states from legal action at the suit of individuals.[2] This meant in practice that any state was at liberty to repudiate its debts, and generous advantage was soon taken of this provision. As time went on, other scandals rapidly multiplied. Powerful corporations found it easy to secure the grant of valuable franchises and other privileges by the corruption of legislators. The members themselves, by the practice of "log-rolling," contrived to secure large votes of public money for themselves and their constituents. In one way and another the position of a law-maker came to be regarded mainly as a means of access to the public purse.

In view of this discreditable record it is not surprising that the draftsmen of the more recent state constitutions have shown themselves eager to lay heavy fetters upon the financial activities of the legislative assemblies. A large

[2] The adoption of the amendment was due to a decision of the Supreme Court which upheld the right of an individual citizen to sue the state of Georgia. The defendant state flatly refused to obey the decree, and throughout the Union violent indignation was aroused against the Court, which was deemed to have violated the principle of state sovereignty.

number of states prohibit their legislatures from contracting any debts at all, except to meet certain special emergencies, such as insurrection or invasion. Others require that all proposals pledging the credit of the state shall be submitted to a referendum. Others again confine the public indebtedness within a certain maximum limit, which is usually fixed at a low figure.

The power of taxation and the power of appropriating funds are also hedged about by a number of restrictions designed to meet those abuses which experience has shown to be most serious. Many of these provisions are intended to prevent public service corporations and other commercial bodies from obtaining relief from taxation or other special privileges at the expense of the community. Even the right of giving state aid to charitable institutions is surrounded with jealously drawn safeguards. A large number of rules in various states prescribe a special procedure for all money bills, the object of these rules being to ensure that financial measures shall not be rushed through without full publicity and adequate opportunities for discussion. A very important check has been introduced in many states by giving the governor the right to strike out individual items in an appropriation bill without compelling him to take the responsibility of vetoing the whole measure. This prevents the legislature from smuggling through undesirable appropriations under the cover of a measure, the greater part of which provides for expenditure that is necessary and proper. In

federal affairs the absence of any such power often proves a serious embarrassment to the president and greatly weakens the executive control over Congress.

Notwithstanding all these numerous restrictions, there still seems to be an undue amount of jobbery and extravagance, and most American writers upon the subject appear to consider that the general system of state financial administration is very far from satisfactory.

In all countries and at all periods those men who are placed in control of public money are subject to a continual temptation to use their powers for the advancement of their own favorite purposes or even, if they are still less scrupulous, for their own enrichment. Since politicians are usually not much more moral than other men, and are sometimes conspicuously less so, it necessarily follows that a large number will succumb to this temptation, unless measures are taken to deter them. The comparison between the American and Canadian systems sketched in the last few pages will serve to indicate in outline two different methods of approaching this problem. The American states have dealt with the difficulty by closely shackling their legislatures and narrowly limiting the area of the field within which they are allowed to work their powers for good and evil. The Canadian solution, inherited from Great Britain, consists in leaving the legislature free, but coordinating all financial policy under the control of an executive government responsible in the

first instance to the legislature and in the last resort to the people. In practice a Canadian ministry is very much in the position of the directorate of a business company, which is accountable to the shareholders for the management of the company's finances. The American system may have many merits from the point of view of abstract political theory, but it does not bear the remotest resemblance to the practice of any business administration.

The finances of the provinces of Canada are conducted upon the system common to the Dominion and to other governments of the British parliamentary type. The legislatures have the power of imposing direct taxes within their provinces for provincial purposes, and they are empowered to borrow money upon the sole credit of the province. There are no further constitutional restrictions to limit the use or the abuse of either power, but the courts have sometimes found it necessary to restrain the ambitions of provincial treasurers within the proper geographical limits and to nullify taxing statutes that were intended to prevent companies holding Dominion charters from operating within the province.

Provincial revenue is largely derived from taxes on land and from succession duties. Two provinces have now assumed a monopoly of the retail sale of liquor and derive a substantial revenue from that source. In other provinces there is a considerable body of opinion in favor of the adoption of this system.

At the same time it should be noted that the financial relation of the provinces to the Dominion is very different from that which obtains between the federal and state governments in the United States. The states of the American Union are sovereign in respect of all powers not granted to the national authority. They neither pay tribute to the United States nor do they receive any money from Washington. They have parted with the right to impose customs and tonnage duties, but in all other respects they are independent financial units with full authority to raise and spend their own moneys in any way they please. All the remaining restrictions upon their powers are self-imposed.

The framers of the Canadian Constitution handled the problem in a totally different manner. The revenues of the original provinces were swept together into one common fund, to be known as the Consolidated Revenue Fund of Canada. All these revenues were to be collected by Dominion authority. Similarly the debts of the provinces were made the debts of the Dominion, subject to some minor provisions as to mutual accounting between the respective governments. With certain exceptions all the stocks, cash, securities, and public buildings of the provinces were transferred to the federal power, but lands and natural resources were reserved to the original provinces.

At the time of confederation the provinces were thinly populated, poor, and for the most part undeveloped. The general gathering up of their revenues into the hands of the federal

government therefore left them with very small possibilities of income. Nothing much could be drawn from such poor communities by direct taxation, and the natural resources could not be remunerative until they were developed. It was therefore necessary to put the provinces in something like the position of poor relations dependent upon an allowance, and the Constitution accordingly made provision for the payment by the Dominion to each province of an annual sum based upon the population. These provisions were embodied in the British North America Act, and were therefore not alterable except by the Imperial Parliament, so that the provinces were secured in the enjoyment of this source of revenue. Similar provisions were made when new provinces were later admitted to the confederation, but in the case of the three "Prairie Provinces" — Manitoba, Saskatchewan, and Alberta — the Dominion reserved to itself the property in their natural resources. This arrangement has been unfavorably viewed in the provinces concerned, and negotiations have lately been in progress with a view to the transfer of the natural resources to provincial control upon satisfactory terms. Up to the time of writing no agreement upon this question has been reached.

In 1907 the financial relations of the Dominion and the provinces were readjusted by mutual consent, and an imperial statute was obtained giving legal validity to the agreement, which now supersedes the scheme laid down in the Constitution of 1867.

CHAPTER VI

EXTERNAL RELATIONS

Whatever may be the arrangements made for the internal distribution of power in a federal system, it is tolerably obvious that in the domain of foreign affairs the national government must have a complete and undisputed control. To the outside world the whole nation, however internally divided, must appear as one. This elementary principle would seem to involve at least two further propositions. In the first place the national government must have the sole right of corresponding and treating with foreign nations. In the second place it must be able by its own power and authority to honor the obligations into which it enters. Of these two propositions the first is universally recognized. That the second is a necessary consequence is not quite so generally admitted.

The early history of the United States is remarkable for the general failure of the people to realize the elementary truth, that without complete national control of foreign relations national unity cannot be said to exist. The "Articles of Confederation" of 1781 gave to Congress the right to conclude treaties and forbade the states to indulge in separate

diplomacy. At the same time it left the states free to regulate their own customs duties, with the result that tariffs were established in complete disregard of the treaty obligations of the United States. Furthermore the states were given the sole right to raise and equip military forces, and were even permitted, should an emergency arise, to start war on their own initiative.

In the Constitution of 1787 there is curiously little about foreign affairs, and in all the elaborate arguments of *The Federalist* there is only one short letter from Jay's pen (No. 64) dealing with this important subject. It is expressly directed that the president shall appoint and receive ambassadors, and he is empowered to make treaties with the advice and consent of two-thirds of the Senate. In the sixth article it is provided that treaties, together with the Constitution and federal statutes duly enacted, shall be "the supreme law of the land, . . . anything in the constitution or laws of any state to the contrary notwithstanding." The result of this provision is that any state constitution or statute is invalid in so far as it conflicts with the provisions of a treaty; but a treaty and a federal act stand upon a footing of equal authority, and in the case of a conflict between them the later in date will prevail.

These provisions are adequate to prevent the states from directly violating any treaty, but they do not ensure the complete dominance of the federal power in foreign affairs. In cases where there is no treaty in question, it may

nevertheless often be very undesirable that a state should enter upon certain types of legislation which may cause difficulties with foreign nations. But unless the subject-matter of the law deals with a question which the Constitution assigns to Congress, there is no power in the federal government which can compel the state concerned to subordinate its local interests to the general policy of the country. In such cases an awkward difficulty is created. The foreign power cannot communicate directly with the offending state, but can only address itself to the president. In reply the president can only say that the state has acted within the scope of its legal capacity and that he has no constitutional right to interfere.

In Canada this problem has been met by giving to the Dominion government the discretionary right to disallow any provincial legislation whatever, irrespective of the question of legislative competence. In point of fact this powerful weapon is very rarely used, since the federal cabinet has for many years acted upon the principle that unjust or injurious legislation is best left to be dealt with by the people of the province concerned. But in a few cases where the anti-Asiatic legislation of the western provinces has threatened to create international difficulties, the federal right of disallowance has proved itself to be extremely valuable.

With regard to treaties a further problem arises. Some treaties are what is called self-executing, that is to say, their provisions can

be carried out by direct executive action without the necessity of legislation. But in the case of the more important and complicated treaties it usually happens that special statutes must be passed in all the countries concerned in order that the obligations incurred may be duly honored. In countries where the parliamentary system of government prevails, the necessary action on the part of the legislature can usually be predicted with confidence. If it is refused, the refusal is equivalent to a vote of censure on the foreign policy of the ministry and involves either an immediate change of government or a general election. But under the American system the House of Representatives is free to exercise a third and independent judgment upon a treaty which has already been accepted by the president and the Senate, and the position of the executive government is unaffected by any action which it may take. Furthermore, it may often happen that the engagements of a treaty may involve legislation which falls within the legal competence of the several states. In this case the signature of the country cannot be fully honored except with the concurrence of forty-eight state legislatures, each of which in its turn contains three separate components, each armed with the power to delay or prevent the passing of a statute.

In Canada this difficulty has been met by the provision that the Dominion Parliament can pass whatever legislation is necessary to give effect to treaty obligations and can invade for

that purpose the area reserved to the provinces. It necessarily follows that any provincial legislation conflicting with what the Dominion has done is invalid to the extent of such conflict. In practice a Dominion ministry which gives Canadian assent to any treaty takes the responsibility of pledging the assent of the Canadian Parliament, which means for this purpose the House of Commons. If it cannot secure this assent, it must either resign or appeal to the country. An American president cannot make a treaty binding upon the nation without the concurrence of two-thirds of the Senate, but failure to obtain this consent does not affect the president's position. Furthermore, although the treaty so ratified may be sufficient to pledge the country's honor, it cannot in many cases be made effective in practice without the assistance of Congress or of the state legislatures, as the case may be, and this assistance may be refused without disturbing the security of the administration. In other words the signature of the national agent may be repudiated without affecting his status as agent.

For these reasons it is necessary for the diplomatists of the United States in signing treaties frequently to make reservations to the effect that the obligations assumed can only be carried out subject to the limitations of the Federal Constitution. This naturally somewhat handicaps the national diplomacy. A treaty-making agency which is in a position to pledge the action of its country, once the necessary

ratification has been secured, is obviously in a stronger position than one which can only promise performance subject to the consent of other authorities over which it has no control.

It cannot be denied that this failure to secure a full co-ordination of all national power in the matter of international treaties has sometimes resulted in action calculated to discredit gravely the good name of the United States. In the early days of the Republic the failure of the states to assist in honoring the engagements of the nation amounted to nothing less than a gross scandal, which continued even for many years after the ineffective "Articles of Confederation" had been replaced by the "more perfect union" of the present Constitution. It may be interesting to recall the strong language used by Chief Justice Marshall in a celebrated case in 1831:

> "This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.
>
> "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people, once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession

> of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms, have yielded their hands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve the remnant the present application is made."[1]

For technical reasons the Court held that it could not grant the injunction, and Georgia went on her way in cynical disregard of her obligations as custodian of the national honor. In other cases the same state went so far as actually to defy the orders of the Supreme Court itself, and the Indians were without remedy, since President Jackson openly sided with the policy of Georgia in the matter.

The old doctrine of state independence has gradually faded out since the Civil War, and no state in our own day would venture to follow the evil precedents of ninety years ago. At the same time we must admit that even the record of Congress itself has not been altogether free from blame. As we have already noticed, Congress retains the power, denied to a state legislature, of passing an act directly at variance with the terms of a treaty, and by a two-thirds majority in both houses it can even do this in disregard of the president's veto. The exercise of this power is limited only by the sense of moral responsibility, and in some cases this has

[1] 5 Peters' U. S. Reports, p. 15.

unfortunately proved insufficient to confine the legislature within the bounds marked out by treaty engagements. A good example may be found in the case of the Chinese immigrants. In 1868 and 1880 treaties had been made between the United States and China by virtue of which the right of mutual immigration was granted, subject, in the case of Chinese laborers, to restrictive regulations of a reasonable character. The arrangement did not work to the satisfaction of Californian opinion, and in 1888 Congress passed an act which amounted in substance to a total prohibition of Chinese immigration and to a cancellation of the certificates issued under the former statutes. The Supreme Court held that the act was valid, and that any complaint on the part of the Chinese must be addressed to the political department of the government.

Probably there is no nation in the world which has an absolutely clean record in the matter of treaty observance, and I do not intend to suggest by these criticisms that the national policy has been less scrupulous or the national conscience less sensitive in the United States than in other countries. The difference lies in the fact that the federal system of America, dominated as it is by the theory of the separation of powers, enables the responsibility for the breach of a treaty to be diffused, instead of being concentrated. Under the parliamentary system, if a treaty is broken, the national government must accept full responsibility for the breach. If the legislature and the people

continue to support the offending ministers they may identify themselves with its policy and share its guilt, but they do not diminish that responsibility. Under the theory of the separation of powers it is impossible to fix the responsibility. The president and the Senate make the treaty. It is violated by Congress or by the refusal of the states to enact necessary legislation. All these authorities alike are placed in power by direct election for fixed terms and cannot be called to account by the people before the expiry of the legal period. Each can disclaim responsibility for the acts of all the others on the ground that the Constitution gives it no power of controlling them, and there is no paramount authority which is in a position to co-ordinate all the conflicting activities of these many agencies in order to attain one national purpose.

It may be asked why men of such admitted genius as the framers of the American Constitution ever sanctioned a scheme that was open to such obvious objection from the standpoint of sound political science. The answer must be sought in the facts of history rather than in any process of reasoning. Throughout their work Hamilton and his friends were continually faced with the difficulty of inducing a people consumed by state jealousies to concede to the federal government even the bare minimum of powers necessary to any kind of national unity. They deserve the greatest praise for the patience and skill which succeeded in getting the Constitution adopted at all. We should measure the

extent of their achievement, not by the logical defects in the scheme which they put forward, but by comparing it with the Articles of Confederation of 1781. Under the present Constitution the United States was welded into a real nation, which in the course of time became a very great nation. Under the Articles of 1781 it was nothing more than a feeble league, utterly unable to maintain internal order or to secure the respect of foreign powers. The Fathers of the Constitution laid a foundation upon which a solid building could afterwards be reared. The work of construction has been slow and in some respects it is not yet complete. The extent to which it has gone has depended upon the strength of the desire for unity in the nation.

In one respect unity may be said to have been finally achieved. There is no longer any attempt to assert on behalf of the several states a sovereignty independent of that of the nation. The task that still remains is the achievement of a more perfect unity within the federal government itself, and this development, like the other, must depend upon the advance of public opinion towards this end. So far as a foreign observer can perceive, the last few years have witnessed a distinct movement in this direction. There has been a marked growth in respect for the national executive, and there would appear to be in Congress a stronger sense of the duty to co-operate with the president for national ends. The course of events has done much to develop this sentiment. The

outcome of the Spanish War in 1898 left the United States faced with the entirely novel problem of governing large and distant dependencies inhabited by alien peoples and ruled by other laws. This necessarily threw new responsibilities upon the executive government, and Congress realized the need of supporting the government in its difficult task. Diplomatic problems also continued to increase in number and complexity, and here again the sense of national unity proved sufficiently strong to give a generous support to the president, with the result that the diplomacy of the United States, notwithstanding the defects of the written Constitution, proved itself in practice to be as consistent and successful as that of any other power. Finally there came the world war. The first two years of the struggle were marked by keen controversy in the country, during which the president, whose position was one of the greatest delicacy and difficulty, held his hand. When he did move he acted with the sure knowledge that he had Congress and the nation at his back. The unity with which the nation entered upon the struggle was maintained throughout, and the national government received in generous measure the whole-hearted support and co-operation that was necessary for military success. Then came a change. When victory was achieved, differences of opinion arose as to the part which the United States should play in the resettlement of the world, and the conservative tradition of aloofness

from the affairs of Europe carried the day. In refusing to ratify the foreign policy of President Wilson the Senate acted within its undoubted rights, and would have been guilty of a breach of its constitutional duty if it had failed to exercise an independent judgment upon the issue. Furthermore the subsequent elections seemed to indicate that it had more correctly than the President interpreted the feelings of the nation. At the same time the fact that the head of the state could be publicly repudiated without affecting his position came to the outside world as a startling demonstration of the lack of unity in the central councils of the nation. Whether the decision thus reached was prudent policy is a matter upon which the American people alone can form an opinion, but there can be no doubt that it weakened the influence of the United States in the world at large. At the armistice the position of the United States was that of the predominant partner. She was so placed that she could act, as it were, as the chairman of the conference of the world. By her own decision she voluntarily withdrew from this position, and her influence in world councils was diminished accordingly.

This action of the Senate and people, if it remains unmodified, marks a departure from the general tendency of the last thirty years toward a more active international policy, and a return to the older idea of aloofness. This older tradition therefore merits special examination, for it is partly responsible for the defective

organization of the United States in respect to external affairs and may explain the lack of attention given to this matter in the drafting of the Constitution.

As every American knows, Washington's farewell address counselled his countrymen to keep clear of "entangling alliances" with European powers. This advice was entirely justified both by the physical situation of the country at the period and by the political events of the years immediately preceding. The decisive physical fact was that the new nation was separated from all other powers of importance by several thousand miles of water. Communication with Europe was slow, difficult, and uncertain, and the development of science at the end of the eighteenth century gave no ground for believing that it would ever be otherwise. Washington had every reason to expect that the physical isolation of his country depended upon natural factors that were permanent and irremovable. As for the American colonies of the European powers, they were small, weak, and scattered. There was reason for hoping, as events afterwards proved, that some of them might be peaceably drawn within the sphere of the United States. To have entered into "entangling alliances" would have been to interfere with the natural development of American conditions, and to make the continent the battle-ground for the conflicting ambitions of European powers. In Europe the United States had nothing to gain, but the nations of Europe

might be tempted to all kinds of ambitious schemes in America if they could secure the support of the United States.

Recent political experience pointed in the same direction. The United States had gained her independence of one European power only by the assistance of another. This assistance was given, not from any special affection for the American cause, but as part of the larger scheme of military operations which France was pursuing against Great Britain. The same conditions, as Washington well knew, would dominate any connections which the United States might form with any other European powers. Her interests would be entirely subordinated to the plans which her allies might entertain for strengthening their position in Europe, and there was no advantage to be gained in Europe that could possibly recompense the United States for the use which the European powers would certainly make of her assistance. From every point of view Washington's advice was unquestionably the best that could be offered in the circumstances of the time.

Considerations such as these doubtless influenced the framers of the Constitution in thinking that it was unnecessary to make very elaborate provision for the conduct of foreign affairs. Their idea was that it would be well for the country to have as few foreign affairs as possible. Although Hamilton and others fully realized the importance of developing foreign trade, they could not foresee the large part which

commerce was to play in foreign relations. In the eighteenth century foreign policy was largely influenced by dynastic and military considerations, and diplomacy was entirely conducted by a small aristocratic class that was little interested in commercial problems. It is interesting to note that this theory of the aristocratic conduct of foreign affairs is strongly emphasized in the only letter in *The Federalist* (No. 64) which deals with the question. Jay takes pains to point out that the men who handle these delicate problems will be a select class of superior persons, namely the senators, who will be chosen only by indirect election. "With such men," he says, "the power of making treaties may be safely lodged." Furthermore he lays stress upon the importance of securing "perfect secrecy and immediate dispatch," an ideal for which the statesmen of our day show less enthusiasm in public, though they are sometimes influenced by it in practice.

If we bear these historical facts in mind, we shall not be surprised to find that the Constitution of the United States is defective from the point of view of strict political science in the provision which it makes for the conduct of foreign affairs, and that this structural defect has not been without unfortunate consequences in practice. On the other hand, we shall not be inclined to blame the statesmen of 1787 for these defects, but rather to praise them for the patience and skill with which they succeeded in rescuing the nation from an impossible situation.

Furthermore we must recognize that in the course of time, in proportion as the sense of national unity has increased, so the diplomacy of the United States has gained in vigor and in practical success. In so far as it has rested more upon the support of public opinion, it has proved itself stronger, more intelligible, and less tortuous than the diplomacy of countries where the conduct of foreign policy is regarded as the preserve of a limited social class. It has on the other hand been weak in those instances where the rigidity of the constitutional system has permitted the executive to lose touch with the nation and to enter upon a course of policy which the public opinion of the country will not approve.

To give a true sketch of the constitutional relation of the Dominion government of Canada to questions of foreign affairs is at the present time much more difficult. Just now Canada is passing through a period of transition and uncertainty. The exact international status of the Dominion is quite undefined, and there is an extreme reluctance on the part of all men in responsible positions to attempt anything like an authoritative definition. So long as it continues possible in practice to work without friction under existing conditions there is a natural disinclination to commit either Canada or Great Britain to any formal pronouncement which might prejudice the action of either country in some situation that cannot yet be foreseen. A writer unfettered either by official responsibility or by party allegiance is at liberty

to express himself more freely, and I shall therefore try to indicate very briefly the main elements of the present situation.[2]

The development of a special Canadian interest in questions of foreign policy was foreseen by the statesmen of the Quebec Conference, and provision was made for this in s. 132 of the British North America Act, to which reference has already been made. The exact words of this section should be noted: —

> "The Parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries."

Under these words the reader will observe that the treaty-making power is assumed to be vested in "the British Empire," but that Canada and her provinces may have special obligations under such treaties, and that the honoring of these obligations is entrusted to the Dominion. For the discharge of these duties the Dominion is to have an unlimited power of overriding the privileges of the provinces, while on the other

[2] The problems referred to in the following pages have unfortunately been at various times the subject of party controversy in Canada, and the discussion of them has accordingly suffered a certain loss of dignity. The developments of the last few years have shown that Canadian statesmen can rise, when the occasion so requires, above the level of party politics, and it has fallen to Sir Robert Borden to give the fullest expression to the ideals of Sir Wilfrid Laurier. It is much to be hoped that the discussion of these great questions will never again be dragged down to the party level.

hand it is evidently assumed that "the Empire" will rely upon the national honor and goodwill of Canada, not attempting to coerce her by exercising the power of paramount legislation.

The use of the phrase "the Empire" in this section is curious, and was probably an intentional ambiguity. By the accepted principle of British constitutional law the treaty-making power is vested in the king, and all treaties are in fact made in his name. Normally he acts in the exercise of this power upon the advice of the British cabinet, and legislative action, if required, is taken by the British Parliament. Until 1919 it might have been said that, except in the geographical sense, "the Empire" was unknown to the law, and was not under that name a political sovereign capable of making treaties at all. Until the Treaty of Versailles no treaty had ever been made that professed to be "between the Empire and" some foreign country. It seems probable that the use of this ambiguous and untechnical expression was deliberately intended to leave open the question as to the advice which should guide the king in the exercise of the treaty-making power. It was contemplated, we may imagine, that some treaties might be made upon the advice of the British cabinet, others upon that of the Canadian. All treaties should be made by the king as the common agent or representative of "the Empire," but they should only relate to and be binding upon those countries whose advice was sought in their negotiation.

Enough has already been said to show that, so far as her own Federal Constitution is concerned, Canada is in respect of all external affairs a completely unitary power. The Dominion government must in every case bear the full responsibility for any failure to perform the obligations of a treaty binding upon Canada, and the federal system is so devised that the federal cabinet cannot throw the blame upon the provinces or upon any other agency of the national authority. The really difficult and interesting question to-day is that of the extent to which Canada's relations with Great Britain and the other Dominions permit her to exercise an unfettered and independent judgment upon questions of foreign policy and international obligations. The history of the matter is a record of continuous development in the direction of a greater independence. The situation of to-day is profoundly different from that of 1867, but the change, like many other revolutions in British constitutional history, has been accomplished without any alteration in the formal letter of the law.

Here again the law gives us no help. The conduct of foreign affairs in the United States is carried on in literal accordance with the rules laid down in the Constitution. The president and the Senate actually exercise upon their separate and independent discretion the powers entrusted to them by the text of the law. In the case of Great Britain and Canada the law says nothing more than that the prerogative of

making treaties is vested in the king. Since no one contends that the king personally is entitled to exercise his independent judgment on such matters, the real question is whether the power of actual decision is to lie with the British cabinet or with the Canadian. The solution of this difficult problem is not yet fully worked out. For guidance we must look to the history of constitutional practice, and not to the terms of any legal document.

For the purpose of this discussion treaties may roughly be divided into two main classes, those dealing with matters of trade and those dealing with other political questions. With regard to the former the original theory of British colonial administration held that the Parliament and government of Great Britain had the right to regulate all colonial trade in the interests of the mother country. In the course of the nineteenth century this contention was gradually abandoned, and it was in process of dissolution when Canada was confederated in 1867. As far back as 1859 the old Province of Canada had successfully asserted its right to decide for itself upon questions of fiscal policy, but the British government was not yet prepared to admit that a dominion or colony had any right to negotiate upon the matter with foreign powers or to differentiate in their favor. The question became more urgent in 1878, when there came into office at Ottawa a Conservative ministry pledged to the adoption of a protective policy. Upon the representations of the Canadian

cabinet the imperial authorities now agreed to permit Canada to negotiate with foreign powers, subject to the condition that the negotiations should be carried on through British diplomatic agents, who were to be guided in the main by advisers representing the Canadian ministry. A further step was taken in 1893, when the signature of the Canadian representative (Sir Charles Tupper) was affixed, together with that of the British ambassador, to a commercial treaty with France.

In the meantime the concession that the dominions were entitled to decide their own policy had necessarily involved a change in the form of British commercial treaties. It became manifestly unreasonable that the government should continue any longer to make commercial treaties that professed to be binding upon the Empire as a whole, and since 1882 such treaties have always been made subject to reservations which preserved to the dominions and colonies the right to adhere or not, as they pleased.

Another difficulty arose from the fact that the dominions were hampered in their fiscal independence by a number of older treaties made on behalf of the Empire as a whole before the principle of autonomy had been conceded. These treaties usually contained clauses providing for their termination by due notice, and it was strongly urged on behalf of Canada and the colonies that they should be terminated in so far as was necessary to give effect to the principle of independence in fiscal matters. This concession

was for many years resisted by the British cabinet, who feared the danger of admitting any further infractions of the principle of imperial unity. The denunciation of the two treaties principally in question was ultimately agreed to after the Colonial Conference of 1897. After the Conference of 1911 the concession was made general, and the British cabinet negotiated a large number of treaties with foreign powers under which the dominions, through the medium of the king, became entitled to withdraw from older treaties made on behalf of the Empire as a whole.

In all the cases hitherto noted it will be observed that the British government retained a controlling power in the negotiation by virtue of the principle that the king's signature of ratification should only be affixed upon the advice of the ministers in London. Upon the strict theory of equality between Great Britain and the dominions, to which we shall return later, the king should sign a Canadian treaty solely on the advice of the Canadian ministers, and the power of veto exercised by the British cabinet would consequently disappear. The position of inferiority which the right of veto assigned to the Dominion did not pass unnoticed in Canada, and in 1908 it was strongly pressed upon the Canadian ministry that steps should be taken to secure for Canada the formal right to make treaties on her own account. Sir Wilfrid Laurier, who had succeeded in carrying his own objectives at the Conference of 1897,

replied that the existing arrangement worked well enough in practice, and he was disinclined to raise the grave constitutional issues which would be involved in a formal change of the procedure. In 1910, however, he himself initiated a departure in the direction suggested by his critics. For some years a war of tariffs had gone on between Canada and Germany, and it was desired to make peace. The German consul-general at Montreal was empowered by his government to enter into direct negotiations with the Ottawa cabinet, and an agreement was arrived at between him and Mr. Fielding, then Canadian minister of finance. On the Canadian side effect was given to the agreement by an executive order in council made under the provisions of the existing tariff law. In substance, though not in form, this agreement was equivalent to a treaty, and the importance of the precedent thus established lies in the fact that this informal procedure practically enabled the Dominion to negotiate and execute a commercial treaty without any reference whatever to the wishes of the imperial authorities. Later in the same year a similar arrangement was made with Italy through the agency of her consul-general, and in January, 1911, two Canadian ministers negotiated at Washington with the American secretary of state an agreement for an extensive commercial reciprocity between Canada and the United States. Here again no formal treaty was executed, and this last case stands upon a somewhat different footing, for

the United States opened the negotiations through the medium of the British Embassy at Washington, and Mr. Bryce was kept informed of their progress. The agreement never took effect, for it was submitted to the judgment of the Canadian people at a general election, which resulted in a change of ministry. More recently certain informal conversations have taken place between statesmen of the two countries in reference to commercial relations, but no agreement has as yet been reached or proposed. The latest example of this kind is a commercial agreement negotiated at Paris in December, 1922, between two Canadian ministers and officials of the French Ministry of Commerce. Here again a treaty seems in effect to have been made without any recourse to the regular methods of diplomacy, though in this case the British government has been made a party to the agreement through the signature of its ambassador in Paris. Similar negotiations with other powers are said to be now in contemplation.

The problem of non-commercial treaties rests upon a different footing. It is obviously impossible for Canada to consider anything in the nature of a military alliance with other powers nor is it at all likely that she would do so even if she were formally independent. The democratic nations as a whole are coming to agree with the wisdom of Washington's advice against becoming involved in alliances which are "entangling" in their character, and proposals of this kind, however much they may appeal

to professional diplomatists, are not easily commended to the people at large.

The obligations affecting Canada more commonly arise out of agreements reached at large international conferences attended by the delegates of a number of powers. In these cases the substantial question raised is whether the British Empire should act as one unit or as several. The older theory naturally demanded that the Empire should act only as a single unit, and that the policy of its delegation should be directed from London, this result necessarily following from the doctrine that the British cabinet was the paramount government of the Empire, all the Dominion ministries being definitely subordinate. This theory has dominated practice until quite recent years. Great Britain signed and ratified the important agreements framed at the Hague Conference of 1899 and 1907 without any consultation with the dominions. Her delegation to the Conference of 1907 numbered eleven members, but these did not include a single representative from overseas. Of the forty-four nations there represented the great majority were less populous than Canada, and many of them were of no real political importance in world affairs. On the face of it there must be something wrong in a theory which permits Panama, Haiti, and Luxemburg to sign as independent states, although their foreign policy is in fact entirely controlled by more powerful neighbors, while denying the right of signature to Canada and Australia, who could

not in practice be drawn into any war without their own consent.

The same policy was pursued with regard to the international conference upon the laws of war at sea, which was convened by the British government at London in 1908 and resulted next year in the abortive agreement known as the Declaration of London. Ten nations, including Holland and Spain, took part in the conference, and again Great Britain included no representatives of the Dominions among her delegation. This procedure evoked a formal protest on the part of Australia at the Imperial Conference of 1911 and an agreement was adopted that the dominions should be consulted in all similar cases arising in the future.

With regard to arbitration treaties the more recent practice has been for the British cabinet to consult the dominions before any such agreement is concluded, but it has not been usual to include proposals for separate dominion action in the text of the treaty. To this, certain treaties made with the United States have been an exception, and they include provisions to the effect that the consent of a dominion must be obtained to any case of arbitration in which its interests are directly concerned. This was intended to counterbalance the American reservation that the consent of the Senate must be obtained to the submission of any particular issue to arbitration.

The discussion of the whole question took on a new aspect through the outbreak and the

successful termination of the European war. As soon as hostilities broke out, each of the self-governing dominions, on its own initiative, without any stimulus from London, decided to take an active part in the war and raised large forces for that purpose. During the war these troops, while on active service, were kept distinct under their own officers, and were only placed under British control from time to time in the same way that all the Allies found it frequently necessary, for military reasons, to place portions of their forces under foreign command. Each dominion judged for itself the extent and manner of its participation. For example, Canada and New Zealand adopted the principle of conscription, while Australia and South Africa did not. Each dominion also decided for itself upon the legislation which it considered to be necessary for the prosecution of its military effort. The result was that, when the final victory was achieved, after more than four years of fighting, the feeling had become firmly established in all parts of the Empire, including Great Britain, that the dominions were entitled to make their voices heard in the negotiation and signature of the peace. What happened in consequence deserves careful notice.

In the first place, the British Empire appears for the first time as a treaty-making body under that name. In the protocols to the Hague Convention of 1907 and the London Declaration of 1909, to take two modern examples, we have the phrase "Great Britain." The use of

the phrase "the British Empire" in the group of peace treaties made in 1919 recalls the language of s. 132 of the Canadian Constitution and points to a new theory.

Turning the page to the lists of the delegates we find that the king, as one of the "high contracting parties," is represented, not by one group of delegates, but by six. He is represented "for the Dominion of Canada" by certain delegates and "for" other dominions by others. The treaties were separately signed by each group of delegates, and unless this procedure was nothing more than an idle form it can only have meant that the refusal of, let us say, the Canadian delegates to sign would have meant that Canada was dissatisfied with the proposed treaty and preferred to continue the war.

The precedents of Versailles were exactly followed in the forms of the group of treaties signed at Washington in February, 1922, relating chiefly to international disarmament. "The British Empire" appears as a party to the treaties, and all the dominions sign separately through their own representatives. Some adverse criticism was aroused in Canada by the fact that the United States did not send a separate invitation to Canada to take part in the conference, but such criticism rests upon a misunderstanding. The exact international position of Canada is not yet formally defined, and until it is so defined the discussion of the question must be entirely between Canada and Great Britain. For the United States to have sent a separate

invitation to Ottawa would have been equivalent to a recognition of Canada as an independent power, and would have constituted an intervention in a domestic discussion between Canada and Great Britain. In this case the State Department at Washington behaved with its usual scrupulous regard for the correct forms of diplomatic intercourse.

Then came the question of ratification. Every treaty needs ratification by some sovereign authority, and in British constitutional law this function is vested in the king. In previous cases it had been invariably assumed that the king's signature of ratification should be affixed solely on the advice of the British cabinet. Even so late as 1917 this practice is maintained as essential to the maintenance of any imperial unity by the most distinguished of our modern constitutional writers, Sir A. B. Keith.[3] In all the earlier cases of treaties affecting the dominions, however much the conduct of negotiations may have been entrusted to their representatives, it was invariably claimed that the royal ratification must be granted or withheld solely on the advice of the British cabinet. London must always have the final word. But the procedure adopted in 1919 seems to mark an abandonment of this contention in substance, if not in form. The Treaty of Versailles was quickly laid before the British Parliament, and the approval of that body was

[3] "Imperial Unity and the Dominions," p. 293.

easily obtained. Nevertheless the king's signature was withheld until the assent of the dominion parliaments was received. The Canadian Parliament was not in session at the time, and Sir Robert Borden's government called a special session, which was held on the first of September.

On the second of September the prime minister moved in the House of Commons the following resolution:

> "Resolved, that it is expedient that Parliament do approve of the Treaty of Peace between the Allied and Associated Powers and Germany (and the Protocol annexed thereto), which was signed at Versailles on the twenty-eighth day of June, nineteen hundred and nineteen, a copy of which has been laid before Parliament, and which was signed on behalf of His Majesty, *acting for Canada*, by the plenipotentiaries therein named, and that this House do approve of the same."

Parliament duly passed the motion after a debate in which the significance of its action was fully explained by the prime minister. When similar action had been taken by all the dominion parliaments, the king's signature of ratification was then affixed.

The essence of the new doctrine is contained in the three words "acting for Canada." Under this theory the British cabinet ceases to be a paramount authority, entitled to review the action of Canada and then to decide whether the king should or should not endorse her action. It is not to be assumed that Parliament used meaningless words on such a great occasion,

and if these words mean anything they mean that the king has become a common agent for Great Britain and for each one of the great self-governing dominions. They were repeated in the preamble to the Canadian statute which was passed shortly afterwards to endow the government with the legal powers necessary for the due execution of the provisions of the treaty.

Furthermore the fact that the approval of the Canadian and other parliaments was sought at all is in itself a matter of the gravest constitutional significance. As we have already noticed more than once, the most far-reaching revolutions in British constitutional history have often been effected rather by a change in practice than by any alteration in the forms of the law. The legal rule which lays down that a treaty must be ratified by the king's signature has not been altered and is not likely to be altered, but the really important question does not touch the formal rule. The real problem consists in deciding what authority is to say whether the king shall sign or not. Before the war it was admitted on all sides that the last word lay with the cabinet in London. Now it would appear, if the precedent of 1919 is to be followed, that the king cannot sign a treaty affecting Canada except upon the advice of the Canadian ministry given after obtaining the approval of the Dominion Parliament. The action taken on this occasion has created a constitutional precedent of the first importance, and it could not be disregarded in any future

case without raising political difficulties of the gravest kind.

Does the converse hold good? In other words, granting that the king cannot sign a treaty without the consent of the Dominion, is it also true to say that he cannot refuse his signature to a treaty negotiated by the Dominion representatives? Does the British cabinet, which has now abandoned all claim to initiate and conclude a treaty affecting Canada without Canada's consent, still retain a right to veto any treaty negotiated by Canada which it may consider injurious to its own interests or to those of other parts of the Empire? Nothing has happened since the war to guide us in answering this question, and it is obvious that the precedents of older days are no longer applicable. If the veto power still remains, it is clear that the Dominion is still in a state of partial dependency, and that the condition of "equality of nationhood," which Sir Robert Borden claimed in his speech before the Canadian Parliament, has not yet been attained.

Some light, however, is thrown on the matter by the terms of the Anglo-Irish Treaty of the sixth of December, 1921, which has since been ratified by the legislatures of both countries and given statutory validity in each.[4] The significance of this agreement from the Canadian

[4] The British statute ratifying the treaty describes it as "The Articles of Agreement for a Treaty between Great Britain and Ireland," a phrase without precedent in the constitutional history of the Empire.

point of view lies in the fact that it expressly assimilates the constitutional position of the Irish Free State to that of Canada, so that precedents established with reference to either country become of material importance in considering the rights of the other. In this document the terms of the Irish oath of allegiance are as follows:

> "I do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established and that I will be faithful to H. M. King George V, his heirs and successors by law, in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of *the group of nations forming the British Commonwealth of Nations.*"

The words in italics are significant as being the first admission in solemn and statutory form of the new theory of the British Empire. They recall Sir Robert Borden's phrase "equality of nationhood," and it may be remarked that English statesmen have frequently used similar expressions during the last few years, although it would be perhaps unwise to attach too much importance to words that are usually uttered in the course of after-dinner speeches or on other genial occasions. More important is the fact that in the first article of her new constitution Ireland is described as "a co-equal member of the Community of Nations forming the British Commonwealth of Nations." This constitution has now received statutory approval in

England, so that the phrase has obtained a place in the text of the English law, but it is so cumbrous and artificial that it is scarcely likely to replace the expression "British Empire" in ordinary speech.

It will further be observed that by the terms of this oath it is laid down that a man's "allegiance" is due only to the constitution of his country, and that his fidelity (not allegiance) to the king is declared to be a consequence flowing out of his country's "membership" in "the group of nations forming the British Commonwealth of Nations."

Finally it should be noted in this connection that the new Irish Constitution expressly declares that Ireland cannot be compelled to take an active part in any war without the consent of her own legislature. This is in harmony with claims made by responsible statesmen in Canada on various occasions, and the principle, while not formally admitted, has not been formally challenged in England. It leaves open the question whether or not a dominion could be technically neutral in a war in which Great Britain was involved. That a declaration of neutrality could in fact be made by any dominion is obvious. The real problem would be for Great Britain and the other belligerents to determine what consequences should follow from such an action. The enemy in such a case would clearly be justified in demanding that the dominion concerned should act in every respect as an entirely independent neutral state: for

example, it would be required to close its ports to British ships of war and forbid the passage of troops across its territory. In this event Great Britain would probably feel that considerations of dignity and interest alike compelled her to treat the declaration of neutrality as equivalent to a formal assertion of complete independence, and would decline to deal further with the dominion concerned except upon the footing of a foreign power.[5]

There is another side to all this development which remains to be considered. The older theory of the British Empire, by which all the dominions and colonies were definitely subordinated to the general control of the cabinet in London, involved a corresponding liability on the part of Great Britain to protect her dominions. This might almost be described as a British form of the Monroe Doctrine, but it goes much further. The Monroe Doctrine merely declared that European powers must not attempt to extend their territorial possessions or political control in the New World. The strict theory of British imperial unity required that the mother country should espouse any quarrel in which a colony found itself engaged and bind herself to protect its interests. If one part of the Empire was at war, the whole was at war. It is obvious that such a theory

[5] On the other hand, circumstances can easily be imagined, though very unlikely to arise, in which the neutrality of Canada might be of greater military value to Great Britain than her participation. The European war would have gone much better for the Allies if Belgium had been allowed to remain neutral.

of responsibility presupposed the existence of a central control which would prevent any particular dominion or colony from involving the whole Empire by its own rash actions. If the mother country is asked to give up the paramount control, she cannot in common fairness be expected to undertake the burden of any international complication in which the separate action of the dominions may engage her.

Have we then arrived at a deadlock, from which there is no escape except by the path of separation on the one hand or by a return to the old doctrine of colonial dependency on the other? A dominion which enjoys complete internal autonomy, negotiates its own foreign policy, and decides for itself upon questions of peace and war, is manifestly an independent power in fact, whether it be so called or not. Its real independence is clearly much greater than that of many small communities which are formally entitled to the name of "sovereign states," but are in practice completely under the control of more powerful neighbors. In substance this position has now been reached, and there is not the least likelihood that any dominion will be willing to recede from it in the near future. Furthermore, there is no indication of any desire on the part of the British government or the people of Great Britain to resume the control which they have virtually abandoned.

On the other hand there is no desire on either side of the Atlantic for a formal separation. The

tradition of respect for the royal house is as strong in Canada as it is in Great Britain, and the general relations of the two countries are so entirely harmonious that there is a natural inclination in Canada to allow the position, vague and unsatisfactory though it be, to remain undefined. At the Imperial Conference of 1921, Mr. Meighen, then prime minister of Canada, opposed certain suggestions originating in England for a further definition of the constitutional position, and the question was not closely pressed. It is perhaps not unreasonable that the desire for a more precise understanding should under present conditions come from the side of Great Britain. Mr. Joseph Chamberlain in his later years was continually urging the need for some definite scheme of imperial organization, and official opinion in London, especially among naval and military men, has always been in favor of a more centralized government. As things stand, Canada and the other dominions have in substance obtained all the advantages which could possibly be gained by complete independence. All the old claims to imperial control have gradually been abandoned one by one. On the other hand there has been no corresponding demand in Great Britain to be relieved from the burden of imperial defense, nor has any effective offer to share the burden come from Canada. This is not due, as is sometimes suggested in the excitement of party controversy, to any lack of affection for the British Commonwealth, but rather

to a very legitimate distrust, such as Washington would undoubtedly have approved, of any arrangement in the nature of a military alliance which would pledge Canada to take part in British wars irrespective of her judgment on their merits. Furthermore Great Britain continues to bear the whole burden of diplomatic and consular representation. Shortly after the war an arrangement was reached between Great Britain, Canada, and the United States whereby Canada became entitled to appoint her own diplomatic representative at Washington. Such an arrangement had many reasons of practical convenience to commend it, and it was less open to objection on grounds of principle than the practice of Canadian ministers going personally to Washington and negotiating informally with members of the American cabinet. If Canada is to deal directly with foreign powers at all it is obviously more desirable that she should do so in proper diplomatic form than by resorting to irregular methods. But there has been a very remarkable reluctance on the part of the Canadian government to take advantage of the new privilege. Two ministries of different political colors have now had the opportunity of considering the matter for more than two years, but up to the time of writing (December, 1922) no appointment has yet been made.

That is how the matter stands to-day. So long as no serious divergence of policy arises between Great Britain and Canada, there is no reason why the situation should not continue

indefinitely. The relations of the two countries at present are rendered possible only because no grave differences of opinion exist. The danger of the present indefinite position lies in the fact that it contains no provision, other than diplomacy, for reconciling differences which may in future arise. If some grave issue of international policy appears upon which the two countries take different views, either one must give way to the other or each must pursue its own policy. If the question at issue is one of first-class importance the adoption of the latter course can lead to nothing else than a formal separation, since unity of action in external affairs is the one indispensable condition of any form of union, however slender the bond may be in regard to other matters. Even the American Confederation of 1781, feeble though it was, did attempt to provide by express law that in the face of other powers the whole nation should act as one. The confederation failed because it contained no effective provisions for enforcing common action upon the constituent states, and the present Constitution was carefully drafted so as to deprive the states of their liberty of action in those matters where such liberty would enable them to defeat the foreign policy of the federal government.

Considerations such as these have led to the proposals which have been mooted in various quarters for the establishment of some scheme of British Empire federation. For the most part these proposals have come from private

writers in England, and have not attracted much attention outside a limited number of political students. At the same time they have always commanded a certain amount of sympathy in English official circles, and the naval and military authorities in London have repeatedly pressed the advantages of centralized control in matters of defense. The most important suggestion that has been put forward with any kind of official authority from the side of the dominions was that presented to the Imperial Conference of 1911 by Sir Joseph Ward, then prime minister of New Zealand. In substance this amounted to the creation of an imperial legislature, elected on a basis of population, and charged with responsibility for all questions of foreign policy and defense. It was resisted by the British premier, Mr. Asquith, on the ground that his government could not consent to divest itself of its right of paramount control in such matters. Sir Wilfrid Laurier and the other representatives of the larger dominions were also unfavorable to the scheme, since it would have meant a serious diminution of the autonomy which they possessed in fact, though not in law. At the Conference of 1921 the British representatives were again anxious to secure some scheme for co-operation in naval defense, but did not press their proposals in the face of Canadian opposition.

On paper it would be as easy to construct a federal constitution for the British Empire as for the United States or Canada, but the writers

who have urged this solution fail to see that the difficulty is not one of draftsmanship. The American states were federated and the Canadian provinces were federated because in each case federation was a matter of urgent necessity. Local independence did not work, and every well-informed man could see that it did not work. For the American states separation meant nothing but internal disorder and external impotence. For the weak Canadian provinces it meant a struggling and difficult existence with the prospect of ultimate absorption in the great republic to the south. Nevertheless we know that in each case the feeling of local independence was so strong that federation, urgently necessary though it was proved to be, was only carried through with the greatest difficulty.

In the case of the British Empire the distinguishing feature is that dominion independence has in fact up to the present worked exceedingly well. The dominions have all prospered under the present system or lack of system, and it is impossible to point to any tangible advantage which they would gain by a surrender of their autonomy to some federal authority sitting in London or elsewhere. Even the crisis of the European war failed to break up the apparently fragile structure. It so happened that the self-governing dominions shared the same view of the German menace as was taken by Great Britain. They all took an active part in the war and made an important contribution to the common victory.

The consequence was that the war, while in one sense it was a remarkable demonstration of empire solidarity, served at the same time to accentuate the feeling of dominion independence, and led to the unprecedented demand of the dominions for separate signature and ratification of the peace treaty in 1919. Since then there has been a general inclination to regard proposals for imperial federation as being no longer matters of practical interest. The public demand for it simply does not exist, and without a strong public demand no such revolutionary change could possibly be carried.

If any further attempts are made to find a federal solution, those who sponsor any schemes will do well to bear in mind the one fundamental condition upon which any federal system must rest. In this respect we are faced by precisely the same problem as faced the Americans in the eighteenth century. Unity cannot be achieved without a real sacrifice of independence, and in particular the complete and undivided control of foreign affairs and questions of defense must be surrendered absolutely and without any kind of reservation to the central power. That central power may be constituted in any one of twenty different ways, but unless it possesses a real and unfettered control in these fundamental matters the federal unity will prove to be a fiction. Furthermore, as the experience of the American confederation tells us, the central authority will lack the essentials of true power unless it is given the

right to enforce its will by direct action upon all the individual citizens in the commonwealth. If it can only address itself to the governments of the constituent states and request them to take some particular action, it will be in practice as powerless as the original Congress of the United States. It was at this point above all others that the scheme of government set up by the Articles of Confederation broke down. There is no use whatever in setting up any kind of council or legislature in London or anywhere else, unless we arm it with the necessary power to enforce its will, in matters within its jurisdiction, upon every individual, whether the government immediately over him approves of the federal action or not. This condition further requires that the central government must be armed with the authority necessary to impose and collect the taxes needed for its expenditures. If it has to go to the constituent governments asking them for money it will be utterly powerless. Any federal council or other body that does not possess these essential powers can only be consultative and advisory in character. Since consultation between the various governments of the British Empire is already perfectly easy under present conditions there would seem to be no need for inventing some new and more elaborate machinery of formal conference. Real business is much more likely to be transacted at informal conversations than in set debates.

If we bear these fundamental conditions in mind we will easily realize that the present prospects of imperial federation are extremely small. It must also be remembered that if any effective scheme is ever put on the table it must of course involve a surrender of independence, not only on the part of the dominions, but of the mother country as well, since it is obvious that the dominions can never be asked to return to the old position of dependence on a parliament representing nothing more than the island of Great Britain. Sir Joseph Ward's scheme, which he laid before the Imperial Conference of 1911, was met with a direct negative on the part of Mr. Asquith for this very reason that it would involve a surrender of the paramount authority on the part of the Parliament of the United Kingdom. "That authority," he said, "cannot be shared, and the co-existence, side by side, with the cabinet of the United Kingdom of this proposed body — it does not matter what name you call it for the moment — clothed with the functions and the jurisdiction which Sir Joseph Ward proposed to invest it with, would in our judgment be absolutely fatal to our present system of responsible government."[6] So far as we know, that statement still represents the official view of the British government, and there is no reason to believe that public opinion in that island demands any change. It is equally true to say

[6] Party Papers No. Cd. 5745, p. 71: Keith, "Imperial Unity and the Dominions," p. 504.

that public opinion in the overseas dominions would at present be opposed to any surrender of the autonomy which is in fact enjoyed, and the attitude which Irish opinion would adopt toward any such proposals is too obvious to need explanation.

There remains yet one more difficulty of the gravest kind. India is now regarded as a dominion, and her representatives affixed their separate signatures to the Treaty of Versailles. She has been granted a large measure of parliamentary self-government, which is officially declared to be merely a step in the direction of full dominion autonomy. The population of India is approximately five times as great as that of Great Britain and the other dominions put together. If representation in the proposed federal legislature were to follow the usual rule and be based upon population, it is obvious that India would in effect govern the whole Empire, and it is hardly necessary to point out that none of the white countries could consider for a moment a solution which involved such consequences. If on the other hand India were allotted only a small number of members, or if she were placed in a position of dependence altogether outside the federal scheme, she would have a very real grievance which would certainly be exploited to the full. The relations of Great Britain, India, and the dominions are already embarrassed with very serious difficulties arising out of the attitude which all the dominions have adopted toward the question

of Asiatic immigration, and these difficulties would be greatly aggravated by a solution which placed her in a position of dependence upon a federal authority in which the dominions were largely represented. If India is to remain dependent at all, she would much prefer to be dependent upon Great Britain, the government of which has always been sympathetic with her point of view in the immigration controversy, rather than upon a body which contained a large number of members hostile to her claims.

Nothing is easier than to draw up any number of schemes for the constitution of imperial councils, conferences, and other bodies, so long as they are merely advisory and are not armed with any actual power of enforcing their decisions. On the other hand I would venture to suggest that under present conditions it is absolutely impossible to devise any genuine scheme of federation which would be acceptable to all the nations concerned. All analogies drawn from the example of previous federations are vitiated by the fact that in each case the circumstances have been entirely different. The British Empire as it now stands is a political development entirely without precedent, and its particular problems cannot be solved by any recourse to precedent.

Although professors have sometimes developed into statesmen, no academic writer has any right to assume that he possesses any gift of political wisdom, and there is a certain prejudice, not wholly unjustified by experience,

against suggestions emanating from academic quarters. Still even a professor shares the right of utterance common to all citizens, and the concluding suggestions of this chapter are put forward, not as the result of any special study, but in exercise of the right of every man to speak wisely or foolishly, as he will.

In the first place I would say that the continuous development of the last eighty years should be allowed to go forward by common consent to its natural conclusion, which is the complete emancipation of the Dominion from all control of any kind exercised by the British cabinet in London. In all essential matters the claim to any real and effective control has been already abandoned, and the fragments of power that still remain in Downing Street operate, not as brakes upon dominion autonomy, but rather as pieces of grit in the constitutional mechanism. They do not really prevent the Dominion from having its own way, but they can at any time be a cause of friction, and any unnecessary possibilities of friction should always be eliminated.

Secondly there should be devised a means of rapid, regular, and permanent communication between London and Ottawa, as well as between all the self-governing dominions. The present methods are defective in form and unsatistory in practice. The governor-general at Ottawa is partly a viceroy and partly an ambassador, but he is hampered in the discharge of his diplomatic functions by the fact that he is

also the titular head of the executive government and as such is bound to become a party to all its acts. Similarly the present status of the Dominion high commissioner in London is anomalous and inconvenient. He is partly a diplomatist, partly a commercial consul, and partly a kind of general publicity agent. If an efficient channel of communication is to be established, his position should be regularized as that of a proper diplomatist, duly accredited to the London government and enjoying the confidence of his own. He should take rank among the diplomatic body in proportion to the importance of Canada among the nations, and should be treated with the usual diplomatic forms. Incidentally he should not be employed on odd jobs. On the side of the Dominion it will be necessary to choose for this post men whose distinction has not been chiefly gained in party politics, but who possess the qualities recognized as essential to diplomatic success. It will, of course, be equally important that the high commissioner should be served by a legation staff of suitable training and qualifications.

Thirdly it is clearly desirable that the intercourse of Canada with foreign countries should also be regularized, so that it may be conducted with due dignity through recognized channels. The insistence that all formal diplomatic correspondence shall pass through the British Foreign Office has resulted in practice in Canada negotiating agreements through foreign consuls and by sending political ministers to carry

on irregular conversations in foreign capitals. These agreements are not technically treaties, but they lead in practice to much the same results. Diplomacy of this kind seems to combine the defects of both arrangements. On the one hand it deprives the British government of the power of control, while on the other hand it gives to Canadian diplomacy an undignified and irregular character which is inconsistent with the national status.

In the fourth place steps should be taken to make the central court of final appeal a genuinely imperial and representative tribunal. Experience proves that the dominions, while keen to resent any interference from the executive or the legislature in London, are for the most part willing in practice to accept the judicial appeal to the Privy Council. But the present composition and practice of that tribunal are very difficult to defend. All the judges are appointed on the nomination of the British government, and nearly all of them who actually sit are members or ex-members of the English bench. A few dominion judges are appointed as nominal members, but in practice it is almost impossible for them to attend. The whole atmosphere and mentality of the court are entirely English. Furthermore the Privy Council does not, except in prize cases, hear appeals from the English courts. These appeals go to the House of Lords, so that England herself is not subject to any imperial judicature, but is governed entirely by her own local tribunals, while

exercising an effective control, through judges of her own selection, over all the dominions Such an arrangement cannot be defended in principle. Nor do the appearance and practice of the court suggest a great imperial tribunal. The members, wearing no judicial robes, sit around a horse-shoe table in an inconspicuous room of a government office. They describe themselves as a "Board" and their judgment takes the form of the report of a committee offering "humble advice" to the king. Dissentient opinions are not allowed to appear, though in the great issues which arise for decision it is obviously highly desirable that all the different points of view should obtain the fullest expression. In these circumstances it is not surprising that a strong body of well-informed opinion has grown up in all the dominions in favor of entirely abolishing the appeal. If this point of view is to be successfully met, it can only be by the establishment of a genuinely imperial tribunal, drawing its authority from the whole commonwealth and acting with the public solemnity that its high functions demand.

The solidarity of the Empire depends wholly upon the voluntary co-operation of its self-governing members, and cannot be made to rest upon any basis of formal law, however ingeniously devised. Voluntary co-operation presupposes independence of judgment, not submission to the will of a superior. Sound statesmanship therefore demands the fullest development of national independence and the

removal of such constitutional forms as still suggest that the dominions are in a state of legal dependence upon England. In some respects the solidarity of the Empire is imperilled to-day by grave differences of policy on very serious issues. These differences cannot be settled by the decision of superior authority, and can only be resolved by agreement after free discussion. In order to make easy the course of such discussion it is necessary to regularize and dignify all the channels of communication, both those within the Empire and those between the dominions and foreign countries. If the differences are fundamental and agreement cannot be reached, the unity of the structure must of course be dissolved.

Before leaving the question of external affairs it is necessary to make some allusion to what may be called the imperial possessions of the United States. In this case there is no parallel to be drawn with Canada, since Canada exercises no authority over any territories for which her Constitution does not expressly provide. In each case the text of the Constitution contemplates the government of certain territories which could not conveniently be made into states or provinces. But in recent years the United States has been faced by a new imperial problem that Washington could never have foreseen.

The earlier acquisitions of new territory did not raise the same difficulties. When Louisiana was purchased by Jefferson in 1803 it was acquired

as was expressly provided in the treaty with France, with a view to American colonization and the ultimate admission of new states to the Union.[7] The same general principle applies to Florida, to Texas, and to the lands which fell to the United States as the spoils of her war with Mexico, a war largely engineered by the Southern planters with a view to adding new slave-holding territory to the Union. These were problems, not of empire, but of constitutional development within the limits of the nation.

In 1898 war broke out between the United States and Spain as a consequence of the continual quarrels between Spain and her oppressed subjects in Cuba. The fighting only lasted a few months, at the end of which the Spanish forces had been driven from Cuba and Porto Rico and a Spanish fleet had been destroyed in the harbor of Manila, the town itself being subsequently captured by American forces. None of the territories in question was in a position to organize an efficient government of its own, and in the first instance they were all placed under American military administration. The problem of the greatest difficulty was that presented by the Philippine Islands. The American military government was soon faced with a formidable rebellion on the part of the natives, and this was not suppressed without

[7] Jefferson entertained some doubts as to the constitutional ability of the federal government to purchase foreign territory, and even proposed two amendments to the Constitution to legalize the transaction. His doubts were later dispelled.

difficulty. In 1900 Mr. Taft was sent out as civil governor, but the administration remained an external autocracy, Mr. Taft being responsible only to the president, whose authority technically rested upon his military prerogatives as commander-in-chief under the American Constitution. Two years later Congress passed an act providing for the eventual establishment of representative government, and the first representative assembly for the islands was opened at Manila by Mr. Taft in 1907. In 1916, Congress reorganized the government of the Philippines by an "Organic Act," which is a document of the highest constitutional interest.

Before attempting to examine the provisions of this new constitution we may ask, How far are these imperial developments in harmony with the Constitution of the United States? The question came up before the Supreme Court in a series of cases in which it was contended that all these outlying possessions became part of the United States and so subject in all respects to the text of the Constitution. To have suddenly applied this document in its entirety to countries which for centuries had lived under a totally different system of law and government would have led to impossible consequences, and the Supreme Court reached the only tolerable conclusion when it rejected the contention. "If it be once conceded," said Mr. Justice Brown, in a case concerning Porto Rico,[8] "that we are at liberty to acquire foreign

[8] *Downes* v. *Bidwell* (1900), 182 U. S. Rep., p. 285.

territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them." In other words the Supreme Court held that Congress was practically free to govern the Islands in any way that it pleased, provided that it did not violate the somewhat vague general safeguards intended to protect such rights as religious liberty and freedom of speech. "A false step at this time," as the judge pointed out, "might be fatal to the development of what Chief Justice Marshall called the American Empire."

We thus arrive at the remarkable result that the federal government possesses more power beyond the frontiers of the United States than it does within her borders. Within the United States, Congress and the president are fettered at every turn by the stringent restrictions of the Federal Constitution. Beyond the borders they are an imperial power whose despotism is tempered only by their own sense of justice and moderation.

The limitations of this essay do not allow of anything more than a passing glance at the provisions of the "Organic Act," which was passed to give a new constitution to the Philippine Islands in 1916. At the same time it cannot be entirely ignored, for it is one of the most important documents in the constitutional history of the United States. Here we see Congress, sitting for once as an omnipotent legislature

and unhampered by legislative restrictions, devising in the twentieth century a new constitution for a large country which does not share the special traditions of the American people. In the result we notice some very important departures from the principles of American government as they have been developed within the borders of the United States.

The preamble of the statute contains an express disclaimer of any annexationist aims, and an unequivocal assertion of the intention of the United States to make the Philippines fully independent "as soon as a stable government can be established therein." This is followed by a "Declaration of Rights," similar in most respects to that found in the state constitutions, and including the prohibition against any law "impairing the obligation of contracts." Except for the matters mentioned in this preliminary section, the legislature of the islands possesses "general legislative power," a phrase which recalls that used in the Canadian Constitution, "power to make laws for the peace, order, and good government of Canada." There is no attempt to reproduce the elaborate limitations upon legislative authority which appear in every state constitution. Except for the somewhat vague restrictions contained in the "Declaration of Rights," the legislature of the Philippine Islands would appear to be very nearly a sovereign parliament within its own area.[9]

[9] It is forbidden to create a public debt of more than $15,000,000. There are also some restrictions intended to prevent the abuse of legislative power in the interests of corporations.

The governor-general and vice-governor are appointed by the president and Senate of the United States, and the heads of executive departments are appointed by the governor-general with the advice and consent of the Philippine Senate. The complete control of all the executive departments is expressly given to the governor-general, which marks a return to the theory of the unified executive and a definite repudiation of the principle adopted in the state constitutions. The governor-general is directed to present to the legislature an annual budget, an instruction which implies an approximation to the principle of executive control of finance. This control is not safeguarded by the Canadian rule which prohibits private members from initiating financial proposals, but by a rule enabling him to veto particular items in an appropriation bill.

The governor-general is given a veto upon all legislation. His veto may be overruled by a two-thirds vote of both houses, but in such a case the bill in question must be submitted to the president, whose discretion in the matter is uncontrolled. Since the governor-general holds his office at the pleasure of the president, it is probable that in most instances the president's views upon any question of local interest will coincide with his own, so that the executive control of legislation is practically complete. Congress reserves to itself the unqualified right to legislate for the Philippines in any way that it pleases, thereby asserting a completely sovereign

authority which it does not possess within the frontiers of the United States.

The inferior judges are appointed locally, but the judges of the Supreme Court are appointed by the president and Senate. No provision is made for the election of any judicial officers. Appeals from the Islands can be carried to the Supreme Court at Washington.

Looking at the Philippine constitution as a whole, we see here a clear example of the co-ordination of powers, as distinguished from that theory of the separation of powers which has dominated American political history, particularly in the several states. If we may use the terms which are familiar to students of British colonial policy, we may say that the Philippines have been granted "representative" but not "responsible" government. That is to say, the legislature is autonomous, but the executive is responsible to Washington, and in cases of conflict between the executive and the legislature the last word rests with the president of the United States.

The new constitution is a genuinely American contribution to political science, and is in no way copied from foreign examples, though it bears every evidence of a willingness to learn from the experience of other nations. Being truly American, it may prove to be an experiment of great importance in the political history of the United States. It will give the American people the opportunity of testing by practical experience the working of the

principle of the co-ordination of the powers of government in accordance with a plan devised by themselves. In the course of time it is possible that the knowledge so gained may have considerable influence upon constitutional law and practice within the Union.

A somewhat similar constitution for Porto Rico was enacted by Congress in 1917. In this case the island has been permanently annexed to the United States.

CHAPTER VII

THE BODY AND THE MEMBERS

In the American Union the legal relations of the federal power to that of the several states are governed by a doctrinal theory which rests in part upon a historical fact and in part upon a historical fiction. The fact is that the thirteen colonies which attained their independence were consumed by mutual jealousies and hatreds, and that these passions were sufficiently strong to prevent them from consenting to a completely effective federal union. The fiction is that they were thirteen sovereign and independent states, which agreed to surrender certain specified parts of their sovereign powers to a new national government to be erected by the will of the American people. For this fiction there was never any real political basis. During the colonial period the colonies had of course been bound together by their common dependence upon Great Britain. During the war they were united by the bonds of military necessity, although the efficient conduct of operations was gravely impeded by sectional jealousies and by the lack of a sufficient central authority. While the war was still in progress they formed a new union in 1781 under the very

defective "Articles of Confederation," and the Treaty of Paris in 1783 was signed on behalf of the federal power. In 1787 this unworkable arrangement was superseded by the present constitution, the ratifications of which were completed by 1790. Since that time thirty-five new states have been admitted to the Union. Of these Texas alone enjoyed a somewhat shadowy independence for the few years between its secession from Mexico in 1836 and its formal incorporation into the federal system in 1845. All the remainder have been acquired either by conquest or by cession or by the organization of territories already under the jurisdiction of Congress. In a word, the theory of the independent sovereigns voluntarily conceding specified powers to a new nation then for the first time brought into being rests upon no real historical foundation. In the case of the new states it is obvious that the only sovereignty which has ever existed over their territory has been either that of the United States or that of some foreign power. In the case of the thirteen original members it is equally clear that their so-called sovereignty never had any real international existence. In the territory covered by the colonies no sovereign power other than Great Britain or the United States was ever recognized by the world at large, and international recognition is the only real test of sovereignty.

The fact that this doctrine of state independence was historically fictitious did not prevent

it from being made the formal basis of the Federal Constitution. Furthermore, it did not remain in the obscurity of a mere technical theory, known only to professional lawyers, but became with the great mass of the people a binding article of political faith. As such it proved almost strong enough to wreck the unity of the United States. In the early days of the Republic the dogma was sufficently powerful to paralyze very largely the activity of the new federal Supreme Court. When a majority of that Court held in 1793 that an individual might bring suit against the state of Georgia to enforce payment of a debt, the defendant state flatly refused to comply with the decree and was supported in so doing by public opinion throughout the country. The Georgian legislature actually went so far as to pass an act imposing the death penalty on any person who should attempt to enforce the judgment. Furthermore, the Eleventh Amendment was rapidly passed in order to nullify the decision, and thus it came to be written into the Constitution that no state could be sued by an individual without its own consent. The passage of this amendment was in effect a formal rebuke administered to the Supreme Court by the authority of the whole nation. The first chief justice, John Jay, resigned in 1795 to become governor of New York, and in 1801 he declined an offer of reappointment on the ground that under such a defective constitution the Court was powerless to discharge the

functions for which it had been created. Upon Jay's refusal, President Adams offered the vacant seat to a member of his cabinet, John Marshall of Virginia.

It is customary among writers of American political history to dwell upon the greatness of Marshall as a judge. Undoubtedly he was a very great judge, gifted in a high degree with the judicial faculty of penetrating to the real issue in every case and resolving questions of private right with no less learning than impartiality. At the same time it is more true to say that the special contribution which he made to American history was the work of a statesman, and not that of a judge.

It is essential to a judge that he should be impartial, and in politics Marshall was a partisan, nor was it possible that any public man so situated could have assumed a truly judicial attitude toward the controversies of his time. He was a zealous supporter of the federalist point of view, and he stepped from the cabinet into the Supreme Court to carry on through a new agency the work which he was doing in his executive office. The legislative function of a judge consists in filling up the gaps in the text of the law. Where the lawgiver has laid down a clear rule the courts have no option but to follow it, irrespective of their opinion as to its merits. Where the text of the law is obscure, or where no rule has been laid down at all, the judge may step in and fill up the gap with any rule that is not inconsistent with the existing

text. He need not concern himself to ask whether the new ruling is one of which the legislature would have approved. Sometimes the gap is due to the fact that the lawmakers never thought of the particular problem at all. Sometimes it is due to the fact that they were hopelessly divided upon the question and shelved it for the sake of immediate peace. In either case the judge must accept the responsibility of laying down a definite rule according to the guidance of his own conscience and discretion. If the issues presented for decision involve great political problems upon which national opinion is sharply divided, it is not humanly possible that the judge should listen to the arguments with the impartial mind which he brings to bear upon ordinary questions of private right. He is presumably a man of mature years, and in many cases he will have been actively engaged in political controversy before his appointment to the Bench. To all intents and purposes his mind is already made up before the arguments are opened, and he will therefore occupy himself with the task, not of arriving at a decision, but of finding language that is judicial in form in order to express a decision which he reached while he was still engaged in politics.

The Constitution as Marshall found it was full of such gaps, and indeed the task of filling them up is one that seems likely to go on forever. Marshall laid down the principle that it had to be "adapted" to meet the needs of the time,

and during the whole of his long term of office he continually directed the adapting process with a view to equipping the national government with all powers necessary for the maintenance of unity and authority. The first big problem was to determine what was the function assigned by the Constitution to the Court itself. Was it to be the final interpreter of the text, so that it could dictate to all other agencies of the government the limits and the nature of their powers? Upon this question there was a wide diversity of opinion. The theory that the last word upon all constitutional questions lay with a small group of lawyers appointed by the executive and holding office for life was by no means acceptable to many exponents of democratic doctrine. President Jackson was strongly of opinion that he was entitled to form his own judgment as to the meaning of the Constitution, and a similar claim was put forward on behalf of Congress. Marshall claimed that his court had the last word, and in the end his view was accepted by the nation at large, though there has always been a body of opinion in the country which holds that the power thus claimed is too great for any purely judicial tribunal.

The next problem was that of determining the relation of the states to the Union. The decisions upon this question ranged over a wide field, and we must content ourselves at present with one example. In the great case of *McCulloch* v. *Maryland*, which came up for decision in

1819, it was strongly urged by counsel for Maryland that the Constitution was not the work of the people at large, but merely a delegation of power from thirteen "sovereign and independent" states. In opposition to this contention the Court authoritatively laid down the doctrine that the Constitution derived its validity wholly from the will of the people, and as such was supreme over the states. In order to ratify the instrument, the people acted through the agency of special conventions assembled for that purpose in the various states, but the ratification was the act of the American people and not of the states as separate units.

> "The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties." [1]

Marshall did not destroy the theory of state sovereignty. The text of the fundamental law did not admit of such an interpretation, nor would any extreme assertion of federal rights have been within the range of political possibility at the time. What he did was to impose

[1] 4. Wheaton's U. S. Reports, p. 404. The question at issue was the validity of a Maryland statute imposing a tax upon a branch of the United States Bank.

limits upon a doctrine, which, if it had not been checked, would have destroyed the essential unity of the American nation. What he said to the states was in effect something like this: "I admit that you are sovereigns, if you insist upon that word, but I will remind you that you are not independent. You are communities of an inferior order, each dependent upon a sovereign who is greater than you, namely the American nation or the people of the United States. This greater sovereign has deprived you of some of your essential powers and entrusted them to a new agency of its own creation. It is true that the powers thus granted to this new agency are limited and numbered, but they proceed from a higher authority than yours and within their proper limits they are supreme over anything that you can do."

The full development of this fundamental doctrine was checked by Marshall's death in 1835. For the next quarter of a century the presidential chair was occupied by his political opponents, who filled the Supreme Court bench with judges sympathetic toward the principle of state rights. In 1857 the celebrated decision in the Dred Scott Case, rendered by a court in which the Southern judges formed a majority, laid down that Congress had no power to exclude slavery from the territories. Yet even in this case, which was regarded as a forensic triumph for the opponents of the federalist view, Chief Justice Taney paid verbal homage to Marshall's doctrine.

The final and extreme assertion of the theory of state sovereignty came in 1860, when South Carolina announced that she had withdrawn from the Union and resumed her sovereign place among the nations. In April of the next year the attack upon Fort Sumter removed the question from the forum of peaceful debate, and the next four years were passed in settling the issue upon the battlefield. The right to secede is now expressly disclaimed in the constitutions of several states, and it has gradually faded out of political controversy with the disappearance of the generation that took an active part in the Civil War.

Marshall's doctrine, which has now become an orthodox article of political faith, must not be interpreted to mean that the organs of the federal government are in any sense supreme over the corresponding organs of the state governments. Since the Declaration of Independence the theory of parliamentary sovereignty has never found a place in American political thought, and it is universally held that neither a legislature nor any other agency of government is a complete expression of the sovereignty of the people. All institutions are but agencies, limited in their authority by the instructions which they have received from their principal. This principal is the nation or the people, with whom rests the final supremacy. The people, according to this theory, has created a federal legislature, executive, and judiciary, and endowed them with certain powers

surrendered for this purpose by the several states. All powers not so expressly granted are either reserved to the states or remain ungranted in the people as a whole. From this it follows that the federal government has no supremacy over the state governments as such. It has certain wide powers which it can exercise over the individuals inhabiting those states, and within the limits of those powers the state governments cannot interfere with the federal activity. It is equally true that the federal government cannot interfere with the state governments, so long as they confine themselves within the limits of their proper powers. Within its own area each is a sovereign. The state government is an agency of the sovereign people of the particular state, limited in its activity partly by the powers which it has surrendered to the United States, and partly by the restrictions, usually very numerous, imposed upon it by its own people. The federal government is an agency of the people of the United States, deriving its authority from them and enjoying such powers as have been surrendered to it by the several states. The people of the United States are a greater sovereign than the people of any particular state, and they claim the right, through their judicial organs, to determine all cases of conflict between the various agencies of government.

The reader who is tempted to feel impatient with all this abstract reasoning may perhaps spare some sympathy for a writer who has tried

to distil a correct statement of the political theory out of the immense mass of judicial and academic literature upon the subject. I cannot hope to have been entirely successful. Whatever the correct theory of the American Constitution may be, we can at any rate agree that it is extremely difficult to understand. Nor need we suppose that the doctrine which has been elaborated by countless judges and authors during a hundred years was consciously present to the minds of those who drew up the text of the Constitution. The document of 1787 was essentially a compromise between various views that were logically irreconcilable, and it is obviously idle to look for a clear statement of doctrine in the terms of a compromise. Like most compromises it endeavored to evade the chief points of difference and some of these differences were of such vital importance that they could only be resolved by war.

In Canada there has never been any real doubt as to the general political relation between the Dominion and the provinces. Much litigation has arisen in order to determine whether the subject-matter of particular statutes falls or does not fall within the competence of this or that legislature, and fresh disputes will doubtless continue to arise as new topics present themselves for consideration. All these questions, however, merely relate to the interpretation of the language of two sections in the British North America Act. Upon the general political question there never has been, and

never can be, any real dispute, and this unanimity is due to the universal acceptance in Canada of the doctrine of a single sovereignty operating over the whole area of the Dominion. As between Canada and Great Britain, a very grave question of sovereignty, in the international sense of the word, has arisen in recent years; and this question, as we have already noticed, has not yet received a formal solution, although the claims of the Dominion have been substantially conceded in practice. As between the Dominion and the provinces, there can be no possible doubt that there is only one sovereign power throughout the whole territory of Canada. The seat of sovereignty may have gradually shifted from London to Ottawa, but this change, which is political in its nature and has never been expressed in legal form, does not affect the main principle that the sovereign power within Canada is one and indivisible.

The reasons for this are historical. In 1867 no one could have suggested that there was any sovereign power in Canada other than that of the British Parliament. When the people of Canada decided to reorganize the existing provinces on a federal basis, they procured the passage of an imperial statute which provided that this sovereignty should henceforth be exercised in Canada through a number of new legislatures which were to be brought into legal existence by the provisions of the act. Between these various legislatures the whole sovereignty of the nation was to be distributed. Certain

powers were specifically assigned to the exclusive competence of the provinces. All the remainder belonged to the Dominion. We have nothing corresponding to the American principle that there are certain powers "reserved to the people." All legislative power is completely granted, and somewhere or other you must be able to find an organized and legal body in which the exercise of any particular power is vested.

The principle has been authoritatively stated by Lord Loreburn, delivering the judgment of the Privy Council in a case which arose between the Dominion and the provinces in 1912. The question at issue was the validity of the statute conferring upon the Supreme Court the jurisdiction to give advisory opinions at the request of the government.

> "It is argued that the Dominion Act authorizing questions to be asked of the Supreme Court is an invasion of provincial rights, but not because the power of asking such questions belongs exclusively to the provinces. The real ground is far wider. It is no less than this — that no legislature in Canada has the right to pass an act asking for such questions at all. This is the feature of the present appeal which makes it so grave and far-reaching. It would be one thing to say that under the Canadian Constitution what has been done could be done only by a provincial legislature within its own province. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter affecting the internal affairs of Canada, and, on the face of it, regulating the functions of a court

of law, which are part of the ordinary machinery of government in all civilized countries. . . .

"In the interpretation of a completely self-governing constitution founded upon a written organic instrument such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and in what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the constitution witholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act. It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and obviously bestowed by the British North America Act. Indeed it might ensue from the breach of almost any power."[2]

[2] Law Reports [1912], Appeal Cases, pp. 581, 583.

When it is once clearly understood that there is only one sovereign power, and that the whole power of the people has been vested without reservation in some legislature or another, it is obvious that the differences arising between the Dominion and the provinces can only be questions of the distribution of this power. In other words they become questions merely of the correct interpretation of the language of two sections in the statute. Apart from certain controversies relating to the ownership of public property this problem of the distribution of legislative power is the only one which the relations of the Dominion and the provinces can present for the determination of the courts.

There are, however, certain aspects of the relationship which we should notice, although they cannot become the subject-matter of litigation. The theory of a single sovereignty ruling uniformly throughout Canada requires that there shall in the last resort be some common center of control. Although the provincial legislatures and cabinets are in no sense delegates or subordinates of the government at Ottawa, yet they are very definitely governments of an inferior order, and it is therefore necessary that the central government should have some power of controlling them in the interests of the whole nation.

This control is exercised in several ways. The least important relates to the office of lieutenant-governor. This officer, who discharges at the provincial capitals ceremonial

functions similar to those of the governor-general at Ottawa, is a nominee of the Dominion government and constitutes the formal link between the federal cabinet and that over which he nominally presides. He can be dismissed by the Dominion government for cause assigned, and this power of dismissal has been actually exercised in a couple of instances. The general right of every province to alter its own constitution is qualified by the proviso that it cannot interfere with the office of lieutenant-governor, which means in effect that it cannot affect the federal power of control over its activities. In recent years the functions of the lieutenant-governors have become so far nominal that the office has ceased to have any practical importance in the constitutional system.

More important is the power of the Dominion to disallow provincial statutes, a power which is unlimited in area, though it must be exercised within twelve months. No legislation of any kind is exempt from the federal right of disallowance, and the power may be exercised without any regard to the question whether a particular statute is within the legislative competence of the province. In practice this formidable weapon is very little used, but its presence in the background is very valuable. If the objection to a provincial statute is based upon doubts as to its legal validity, the federal government will usually leave the question to be decided by the courts of law. If again the statute is objectionable merely on the grounds that it is

likely to work injustice or inconvenience to the people of the province concerned, the Dominion government prefers to let them find that out by experience and deal with the matter themselves by ejecting the ministry which has sponsored the act. On the whole it is considered at Ottawa to be sound policy to refrain as far as possible from the exercise of paramount authority, so long as the authority is realized to exist. The real value of the reserve weapon lies in the fact that it can be used whenever there appears to be a danger that provincial legislation may run counter to the general interests of Canada. Upon this principle the federal cabinet has used its power to disallow some western legislation directed against Asiatics that seemed likely to cause international difficulties Occasionally the power of disallowance has also been used to nullify provincial statutes which were confiscatory in their nature. In Canada there is no constitutional probihition against legislation of this type, since every kind of statute, however foolish or unjust, is within the competence of some legislature. But the federal cabinet is quite within its rights in deciding that statutes of a confiscatory nature offend against sound principles of legislation, and that their passage unchecked might form a precedent contrary to the general interests of the Dominion.

Thirdly we may recall the power, to which reference has already been made, of passing any legislation that is necessary to give effect to the treaty obligations of Canada.

To this prerogative of paramount control there is nothing corresponding in the Constitution of the United States, nor would it have been possible to suggest the grant of such powers in 1787. The absence of any such overriding authority at Washington has led to certain political complications in the United States which could not arise in Canada. To take a very recent example, at the November elections of 1922 referendum votes were taken in several states to decide whether or not the state should join in enforcing the federal prohibition law introduced under the Eighteenth Amendment. If in such cases the people of the state decide to refuse their co-operation, the result is that the federal government must take upon itself the whole burden of enforcement, which is very nearly equivalent to saying that there shall be no enforcement of the law in question. In Canada no such question should arise. The Dominion Parliament has never made use of its admitted power to pass a general prohibition law, and is not likely to do so, but if any such law were passed it would automatically become the duty of every public official, whether of federal or provincial appointment, to enforce it in so far as it came within the sphere of his duties.[3] In the United States a federal statute

[3] I am here, of course, only speaking of strict legal duties. Executive discretion may be allowed to an extent which may considerably influence the actual operation of the law. For example, the Lord's Day Act is a Dominion statute, but most travelers will nevertheless observe a difference between Sunday in Montreal and Sunday in Toronto.

only affects the citizens in their private capacities, and cannot impose duties upon the officers of a state in their capacity as such. Upon the American theory there are two sovereigns and neither has any right to interfere with the lawful activities of the other. Upon the Canadian theory there is only one sovereign, and every officer of state is bound to obey its commands, provided that they are conveyed to him through the proper agency.

CHAPTER VIII

THE PRACTICE OF POLITICS

There is a tendency among many observers to exaggerate the importance of the differences between the so-called "written" and "unwritten" constitutions, the American and British systems being commonly taken as the examples of the two types. There is in fact no such thing as an "unwritten" constitution, and the great majority of rules governing the political structure of Great Britain are expressed positively in statutory form. On the other hand it is equally true that no body of formal constitutional law, however elaborately drafted, can ever present a true picture of the actual working of political life. Custom, tradition, political ingenuity, and party organization can combine under any formal scheme to direct the actual current of public affairs into channels of which the draftsman never dreamed. In many cases they will be able to manipulate the institutions which he invented for the achievement of precisely those ends which he was most anxious to defeat. To take a well-known example, the practice of American politics has completely defeated the original purpose of the founders of the Constitution that the president should be elected, not by direct popular vote, but by

the choice of a small body of special electors. So again the ingenuity of Southern politicians has in effect nullified the constitutional amendments passed after the Civil War with the object of giving the negroes political equality with white men.

No sketch of federalism in North America, however slight, would therefore be complete without some attempt to describe the use to which the political machinery is put in the actual course of politics. There is no need to examine the history or principles of the chief political parties in the United States or Canada. So far as principles are concerned, the old traditional parties have largely ceased, in their collective capacity, to profess them. They persist as organizations and from time to time they offer to a slightly cynical public what they call a "platform," which is framed on each occasion to meet the exigencies of the political situation. Under modern conditions there is no real continuity of principle or tradition in the series of platforms prepared by each party, and they are often characterized by an intense anxiety to avoid taking definite sides upon any big issue that is really dividing the nation. For example, neither the Republican nor the Democratic party in the United States is willing to commit itself to a decision upon the question of prohibition, and the same issue is largely evaded by the Liberals and Conservatives in Canada. The old party names have become mere labels to which no real meaning is any longer attached.

In the present essay a study of political parties would be out of place.

On the other hand the forms of the two constitutions have a close relation to the actual practice of politics, both in the United States and in Canada. The observer who is struck by the general similarity of social life and habits in the two countries is sometimes surprised at the utter dissimilarity in all matters of political and party organization. These differences are directly traceable to the differences in the legal structure of the two federal systems, and for this reason they demand our attention.

No country was ever more fiercely torn by party controversies than was the United States in the early days of its independence. The spirit of faction poisoned every part of the public life of the country and evoked the most intense disgust in the little group of great men who took upon themselves the burden of saving their land from anarchy and chaos. They determined, as every political idealist has determined, that the new constitution should so far as possible be framed with a view to neutralizing the influence of faction in public life, and in No. 10 of *The Federalist* Madison claimed that this object had been achieved. The result belied their hopes. In no country has the organization of politics on party lines become more elaborate or complete, and in no country has the influence of party penetrated more deeply into even the smallest details of political life.

This result is traceable to two main causes. In the first place it is due to the doctrine of the separation of powers, which is embedded in both the federal and the state constitutions, and secondly it is due to the democratic theory which in the several states throws upon the voters the duty of continually electing large numbers of representatives and public officials of every kind.

This is best understood by comparing the American practice with that of Canada. Under the Canadian system the principle of democratic control is enforced, not by frequent elections, but by the doctrine of responsibility. The executive government is under the daily necessity of accounting for its actions to the elected legislature. Above them both stands the electorate. If the government cannot satisfy the legislature, it must either resign or appeal to the country. In any event an appeal must be made every three or four years. A government that fails to justify itself may not last more than a few weeks. A prime minister who commands the confidence of the people may remain in office for half a lifetime. The electorate is called upon from time to time to pass judgment upon the larger issues of politics, but is not being continually asked to vote upon all manner of minor questions and upon the appointment of unknown persons to posts of minor importance. Since the electorate is only called into action at infrequent and irregular intervals, it naturally follows that the organization

required is comparatively small and remains comparatively inactive except during the period when an election is impending. The great majority of office-holders are unaffected by a change of government, so there is not very much in the way of patronage wherewith to encourage the professional party organizer. He may hope to be rewarded by the government with some judicial or administrative appointment, but on obtaining it he definitely severs his connection with politics, and looks forward to spending the rest of his life as an official or as a judge. Such organization of parties as exists is very loose and informal and is entirely unknown to the law. No such thing as a party has any legal existence, and every man attaches himself to one party or another entirely according to his own fancy. Very few persons receive any pay in connection with party organization, and the work chiefly falls upon informally constituted committees inspired partly by their own enthusiasm and partly by the hope of gaining political recognition and advancement.

Furthermore, the close relation of the executive and legislative power under the Canadian system throws the leadership of parties into the hands of those public men who hold, or hope to hold, the chief offices of state. The responsibility for formulating the legislative program of the party in power belongs to the prime minister and his cabinet. The chiefs of the other parties similarly announce what they propose to do when

they have turned out the existing government.[1] All the local organizers are mere subordinates whose work it is to help the big men who take public responsibility for defining the policy of the party. Since the executive and the legislature are closely interdependent, the same men must make themselves responsible for both executive and legislative policy. The opposition criticism of the government is responsible criticism, in the sense that the principal critics must be prepared to take over personally the duties of government if the ministry goes down before their attack.

In the United States the doctrine of the separation of powers has resulted in taking the party leadership away from the public men who fill the great offices of state. The president of the United States is the nominee of his party, but he is in no sense its leader. It is not part of his function to take the initiative in drawing up the executive and legislative policy of the government. With legislation the government as such is not concerned, for it can do no more than recommend certain measures to Congress, and Congress is quite at liberty to deal with these recommendations as it pleases. The program or "platform" of the party is drawn up by a group of party organizers before the president is nominated, and he accepts it from

[1] Under the Canadian law the chief of the principal opposition party in the House of Commons receives a salary as "Leader of the Opposition," so that he is legally recognized as a person performing a public function in the service of the country.

their hands as part of the equipment of his office. Since the executive has no control over Congress and may indeed be at variance with one or both houses, it necessarily follows that the organization and leadership of Congress also falls into the hands of party organizers untrammeled by the responsibilities of office. The immediate control of the House of Representatives is vested in the speaker, who is regarded as a party agent, and in the chairmen of the more important committees, who are also expected to manage business in the party interest. These men are again the nominees of party organizers who work behind the scenes. They differ from the public men who lead parties under the Canadian system, in that they have no definite responsibilitity to any public and lawful body, nor have they any hope of succeeding to executive office. The Canadian cabinet minister who brings an important measure before Parliament says, in effect, "The cabinet have decided that this bill is necessary in the public interest. If you reject it we shall interpret that vote as a lack of confidence in the ministry. In that case we shall either ask our opponents to assume the responsibilities of government, or we shall dissolve Parliament and ask the electorate to judge between us." Under the American system the men who control Congress have no responsibility for the conduct of the executive government. With regard to legislation they promote the measures which they deem desirable, but they have no personal

responsibility either to the House or to the public for the failure of their legislative program. Such responsibility as they incur is toward the organizers of their party, who may get rid of them if they prove themselves to be inefficient in the prosecution of party business.

When we pass from federal to state government we find the principle of the separation of powers carried much further, with the result that still more power is placed in the hands of the party organization. Under most of the state constitutions there is not only the separation between legislative and executive power, but the executive authority is itself divided among a large number of officers who are all separately and independently elected by direct popular vote. The great majority of the elective offices are of minor importance, and they are naturally filled by unimportant men who are usually unknown to the electors. The real work of selecting the candidates therefore rests with the party organization, which consequently enjoys what amounts in substance to a very wide power of public patronage. Furthermore, the business of elections is going on almost continually. There is never an interval of more than a few months between one election and another. The management of these elections involves an immense amount of complicated work which can only be undertaken by men who give themselves up to it as to a regular profession. Furthermore, the office-holders are elected only for very short terms, and their tenure of office

is entirely dependent upon the continued favor of their patrons, since the work which they do is usually not such that the public is in a position to form an opinion upon their merits. This again throws still more power into the hands of the organization.

There has always been in the United States a very strong spirit of genuine democracy, which manifests itself in a vigorous resentment against any form of arbitrary power, no matter by whom that power may be exercised. The spirit which prompted resistance to the very mild and ineffective experiment in tyranny attempted by Lord North often has been quickened into life by new dangers, real or imaginary. It inspired the opposition which Hamilton and his friends had to overcome in their efforts to carry the Constitution of 1787. It has manifested itself from time to time in opposition to the power that has been developed by great combinations of wealth or numbers, such as the commercial trusts or the workmen's unions. Much of the hostility aroused by the present prohibition law is due, not only to the defects in the law itself and in its enforcement, but to the feeling that the agencies of the national government have been captured by a great organization, which, however widely supported, nevertheless represents only a section of the nation organized in a particular manner to impose its will upon the whole. At the time of writing there seems to be every likelihood of a similar conflict between the American people and the

powerful secret organization known as the "Ku Klux Klan." The same spirit has expressed itself in recent years in a vigorous effort to overthrow the power of those great party organizations which Americans often call "the machine."

The efforts made to deal with this evil constitute one of the most remarkable experiments known in the history of political science. They proceed upon the same principle that has been adopted by many European countries in their attempts to deal with the problem of professional prostitution. In other words they have said, in effect, "We cannot eliminate the evil which arises from the organization of political parties by professional politicians. It represents a demand which in one form or another must be satisfied. Therefore let us take the whole business under the shelter of the law and regulate it so minutely as to diminish as far as possible the public dangers to which it gives rise."

The result has been the enactment by nearly all the states[2] of a great mass of enormously intricate statutes in which the existence of political parties is formally recognized by law and by which they are placed almost upon the footing of corporations playing a definitely recognized part in the constitutional government of the country. Under these statutes a political

[2] It would probably not be legally possible under the Constitution to enact federal laws of this character, but the state laws are applicable to federal elections within each state.

party becomes a legal entity with a definite list of members like the shareholders of a railway company. Upon these great organized societies is conferred the right of nominating candidates for public office. Although the right of independent candidates to offer themselves is nominally preserved, it is usually of no practical value. The selection of the regular candidates is governed by an elaborate voting procedure, the details of which are minutely laid down by law, the object of the law being to ensure that every citizen shall have the right to vote directly upon the selection of his party candidate. Of course this has resulted in effect in duplicating the whole process of elections. Before the citizen can cast his vote in the actual election for the offices he must go to the "primary" and vote for the man who is to be the official candidate of his party. The first of these two elections is in every way as legal and formal as the second. In strict logic there seems to be no reason why the process should not go on indefinitely, so that there might be a sub-primary within the primary to select the candidates for the candidature.

Although the ballot laws of the various states differ considerably, the majority of them officially recognize the existence of the parties on the ballot paper. That is to say, the ballot paper usually gives the name of the party to which each candidate belongs, and in many states the names of the candidates are grouped in columns under party headings. Sometimes it

is even provided that the elector can vote for what is called a "straight party ticket," that is to say, he can place one mark on the paper for the whole block of party candidates. Where this practice is permitted, it seems to mark the final negation of the essential principles of democratic government, for it means that the voter in effect surrenders his right of personal judgment into the hands of his party organizers and gives them a blank authority to select the officers of state.

The idea which underlies the whole system of the "direct primaries" is that of getting rid of the old "conventions" manipulated by professional organizers for the nomination of candidates, and substituting a scheme by which each member of a party should vote directly for the candidate of his choice. In other words it was an attempt to treat the party as a kind of state within the state, and compel it to choose its candidates by the same method of direct election as applied in the case of public officers. The motive of this policy was admirable, but the main result appears to have been to shift the weight of the machine organization to an earlier stage of the proceedings. Instead of the machine nominating the candidates for election, it now busies itself with selecting the candidates for the candidature. The system of election is much more complicated than it was before, and therefore needs a larger amount of expert professional management. In most states the electoral law now fills a substantial volume of

closely printed matter and cannot possibly be understood by the average man. Its administration requires a large body of trained workers, and this naturally costs a great deal of money. Consequently the introduction of the direct primary system has not meant any real relief from the rule of the party bosses, and many competent American observers are of the opinion that it has really made matters worse than they were before.

In truth the attempted remedy was an experiment in political homeopathy. The complexity of a system involving innumerable elections had naturally developed the big organization which was necessary to deal with the great mass of work. The monster thus created was fattened on elections and grew great on elections until his shadow darkened the whole land. Unfortunately the reformers could think of no means of reducing his stature except by feeding him with more elections. The identification of the principle of democracy with the process of voting had become so far an obligatory article of faith that the leaders of opinion in the various states were really not at liberty to suggest any other means of dealing with the evil. The only real remedy for the abuse of party machinery is to cut the ground from under the feet of the organization by reducing the number and frequency of elections and thereby limiting the scope of its activities. In other words what is needed is a return in some measure to the principles of the original constitution

and a repudiation of the pseudo-democratic theories that were developed in the nineteenth century.

The elaboration of the party organization in the United States has naturally tended to confine the current of political life to the channels of the two historic parties, although neither of these can any longer be associated with any definite body of political doctrine or policy. On the big issues which from time to time divide the nation, such as the liquor question, each party usually endeavors to avoid committing itself to a decision either way. The attempt is always made to frame the party platform in such a way as to make a vague appeal to everybody and at the same time not to challenge any definite opinions which are strongly held in any quarter. It is therefore very difficult to organize a new party for the promotion of any definite policy. Such parties have appeared from time to time, but their existence has always been fleeting and ineffective. If any body of men, such as the prohibitionists, have a clear policy of their own, they do not now form a special party to attain it, but they try to ensure that the candidates of each of the two regular parties shall pledge themselves to its support. If both candidates give satisfactory assurances, the sectional organization permits its followers to vote on the ordinary party lines. If one is hostile, the vote which it controls is thrown against him regardless of party affiliations.

Such tactics are by no means unknown in Canadian politics, but the greater freedom and laxity of party organization makes it much easier for new parties to be formed to meet new conditions. For example, in 1919 the farmers of Ontario decided to break with both the Liberals and the Conservatives and to form a new party for the promotion of their own special interests. At the election they secured a majority of the seats, with the result that a farmers' government was formed. More recently the same thing has occurred in two other provinces, and there is now a strong farmers' party in the Dominion House of Commons. It is by no means uncommon in Canada for three or four candidates to be engaged in a contest for one seat. At all Canadian elections the names of the candidates are given on the ballot paper in alphabetical order without any reference to their party affiliations. At the present time (1923) there are three main parties in the House of Commons, as well as a handful of members representing other points of view. The regular supporters of Mr. King's government are approximately equal in numbers to all the other groups put together, a fact which necessarily influences to some extent the policy of the cabinet. In other parliamentary countries, notably France, the organization of separate groups has gone even further, and the present tendency of Canadian politics is unmistakably in the same direction. In France the result has been that changes of ministry have been

very frequent, but they are not usually accompanied by a dissolution of the Chamber of Deputies. Rapid changes of government would be so contrary to the tradition of Canadian politics that a similar result is not likely to follow from a further development of groups in the party system. It is more probable that we all see the growth of an understanding by which the legislature will enjoy a greater independence of action, it being tacitly agreed that a ministry shall not be expected to resign except as the result of an adverse vote amounting to a direct censure upon some major issue of policy. In some provinces there has already been a definite movement of opinion in this direction.

CHAPTER IX

SOME CONCLUSIONS

There are probably no literary tasks more tedious and distasteful than revising the manuscript of a book written by oneself. It is difficult to avoid a feeling that the labored words of the text will appear as dull to the reader as they do to the author, and the writer's mind is oppressed with the consciousness that he will certainly remain blind to many faults which are obvious to everyone else, and more particularly to the expert reviewer

At the same time it is clear even to myself that the preceding chapters of this essay may convey to the reader a general impression which I have certainly never intended Such adverse criticism as I have permitted myself is more often directed at American than at Canadian institutions, and this may appear to imply a comparative disparagement of the former, although I have never ventured upon such criticism except in cases where my own opinion was fortified by that of competent American observers. If anything in this book has served to convey such an impression, I should like to take this opportunity of correcting it by setting down as briefly as I can a few general reflections

which have occurred to me in the course of writing.

Any body of constitutional law is but a means to an end, and every people has the absolute right of determining for itself the ends which it desires to accomplish by means of its laws. It is idle to institute a general comparison of merits between two constitutions unless we are sure that they are aiming at the same ideal. The general aim of the parliamentary system of government as we know it in Canada is to secure a powerful executive responsible for all its acts to a powerful legislature, the policy of both being subject to periodical review by the people as a whole. It is easy for a Canadian writer to prove that the American Constitution is not equally well designed to effect that purpose, but it is permissible for an American to point out in reply that it was never intended to do so. Efficiency, he might say, is a very desirable ideal, but it is not the only ideal, and in certain cases it may have to yield to other claims. For example, we should all agree that to a great extent the principle of personal liberty should be preserved even at the cost of a certain amount of administrative efficiency. No one would tolerate the organizing of civilian life upon the principles which control a military force on active service. So an American may argue quite reasonably that in his country the attainment of perfect efficiency in government has been deliberately and justifiably sacrificed to certain political principles which are deemed to be of

greater importance. Without professing to judge between these two points of view we may once again glance briefly at the historical origins of American institutions.

Except among a small minority of far-seeing statesmen there was no general demand on the part of the American people in the eighteenth century for the establishment of an efficient national government. We may even go further and say that the prospect of the central government proving itself to be in fact efficient was one which excited widespread suspicion and alarm. In so far as public opinion demanded any genuine federation at all, it wished to have a federal government which should be able to interfere as little as possible with the independence of the several states. The general body of opinion desired quite definitely that the central executive and the central legislature should not be sufficiently powerful to carry out the designs which they might be expected to form. It was intended that all the agencies of the federal government should be closely fettered, and it is obvious that no agency which is fettered can be as fully efficient as one that is free.

This principle of hampering the organs of government was carried much further by the men who drafted the various state constitutions in the course of the nineteenth century. These constitutions have been built up on the principle that governments cannot be trusted, and that they must therefore not be allowed to govern more than is absolutely necessary. This was

by no means a mere abstract doctrine, but had a very definite basis in the actual experience of the people. It was found by bitter experience that the power of legislation was habitually abused for private ends. For this there were only two possible remedies. One was to introduce the theory of responsible government, by which the executive is made accountable to the people for its control of the legislature as well as for its own executive policy. The other was to curtail the powers which were most capable of abuse. The former solution was practically ruled out by reason of the fact that it conflicted with the dogma of the separation of powers, and the second was therefore the only remedy available. The executive power was further weakened by the application of the so-called democratic theory which demanded that all public officers should be separately elected by direct popular vote for short terms.

In effect the American people have reached a decision that the reservation to the people of many governmental powers is a more important object than the securing of administrative efficiency in the government itself. Whether they are right or wrong in this opinion is a matter which they alone can decide. The Canadian principle has been to secure an efficient organization of government and to rely upon the doctrine of responsibility as a protection against the abuse of the large powers which the government enjoys. Each country has undoubtedly prospered under its own system, and is not likely

to make any fundamental alteration so long as it continues to prosper. We must also remember that the American Constitution is now the oldest in the civilized world, and that it is protected by the spirit of intense conservatism which animates the American people in everything that relates to their national institutions.

The principles of administrative efficiency are thoroughly understood on both sides of the border, and no organized bodies in the world are more fully efficient than the great industrial, educational, and other organizations in the United States and Canada which are free from political control. If the American people do not desire their political institutions to be organized upon the same lines, it is because they feel that in politics certain other objects are more desirable than administrative efficiency. Subject to certain qualifications which I will note presently, the organization of government in Canada follows in the main the principles adopted in business. The executive government is responsible to the legislature very much as a general manager is responsible to his directors. The legislature is responsible to the electorate in the same way that directors are responsible to their shareholders. The control of finance is vested, just as it would be in a big business, in a single financial authority which must make itself definitely responsible for any proposed expenditure.

It is not altogether easy for a foreign student to understand the complex reasons which have

led the American people to repudiate in politics those principles of organization which they have so successfully applied in business. In the main the explanations are to be found in the course of American history, and a detailed analysis of these historical causes, even if I were competent to undertake it, would be impossible in the space available at the close of this essay. I can only note the two indisputable facts. On the one hand no American business man would ever dream of organizing his own business, or indeed any other institution in which he was interested, after the model of his own state constitution. On the other hand there seems to be no real likelihood that we shall see any real attempt to reconstruct any of the various political organizations upon the lines which experience has shown to be sound in relation to other matters. For this there are two main reasons. In the first place the present system rests upon certain political theories, which are held dogmatically as articles of faith, without reference to the question of administrative efficiency. Secondly, there has grown up under the shelter of existing conditions an enormous and powerful party organization which has a strong vested interest in opposing any scheme of reform that would impair its own powers. Hitherto American reformers have attempted to strike at the tyranny of the bosses only by adding fresh complexities to a political system which was already intolerably intricate. The real remedy lies in simplifying the political structure so that

the ordinary man can understand it and operate it without the assistance of professional organizers.

The criticism of other people's faults, although more agreeable, is less morally profitable than the contemplation of our own. No existing political system is perfect, and the attachment which we all feel for our own historic traditions should not blind us to the duty of learning all that we can from the experience of others. I will therefore venture to suggest one or two points in which, without altering our own laws and without violating any national tradition, we might yet contrive to improve the dignity and efficiency of political life in Canada.

In the first place, it is admitted practically on all sides that at present we do not succeed in securing the best men for the service of the nation in the great offices of state. The reason for this is not only and not chiefly the comparatively small salaries which are attached to public office. Many of the men whose services would be most valuable could afford to be indifferent to questions of salary, and many who are far less wealthy would be willing to serve for rewards much lower than they could earn in business or in professional life.

The real reason lies in the fact that under our present system of politics we exclude from high office all those who are unable or unwilling to fight their way through all the preliminary stages of controversial politics. As things stand, a man has to make up his mind fairly early that he will "go in for politics." Probably he begins

by serving on some local committee and goes round making speeches for candidates in election campaigns. Later on he may obtain a nomination for himself and so make his way into a provincial legislature or into the House of Commons. After some years of this, if he proves himself competent, he may be rewarded with some minor ministerial post, from which he may later advance to high office and even to the premiership. In many cases he will serve a kind of apprenticeship in provincial politics before he is allowed to be what is called "federal timber." This process is not without value, and it undoubtedly eliminates many men who are entirely unfitted for public life. No man who does not possess in some degree at least the gift of advocacy and the art of dealing with men can hope to find his way into the Dominion cabinet.

At the same time it is undeniably true that by confining ourselves entirely to this method of selecting our rulers we eliminate nearly all those men who have obtained front rank in other walks of life. The man whose genius and industry have raised him by his own efforts to the top of his business or profession has neither the time nor the inclination to work his way through all the preliminary stages of political life. In the world of affairs this lack of the elementary apprenticeship does not disqualify him from holding high positions. It is not necessary for the directors of a bank or a railway to have worked their way up from the bank counter or the ticket office. Of the

directors of a bank one may have been trained in railway administration, another may be a lawyer, and a third may be an engineer. Most of these men would be valuable in the cabinet, but under our present system they are entirely excluded. They would usually possess some skill in administration, and many of them would have sufficient gifts of advocacy to enable them to hold their own in the House of Commons. Such men are entirely at the disposal of the president of the United States, if he desires to include them in his cabinet.

The services of men of this type might be made available to the government of Canada by the simple adoption of a rule of procedure which would enable ministers to speak in either house of the legislature without having the right to vote. No change in the law would be required, for the law does not require that ministers should be members of either house, and the adoption of such a rule would involve no breach of our constitutional principle of cabinet solidarity and responsibility. It would free the prime minister from the disagreeable necessity of considering whether a man otherwise suitable for office has a "safe seat." In a word it would leave him free to choose from among his own supporters the best possible man for each post without being compelled to consider circumstances that should be regarded as irrelevant.

This scheme was adopted by the statesmen who framed a constitution for the Confederate

states at the beginning of the Civil War. They were struck chiefly by the inconvenience of the rule which excluded cabinet ministers from the federal Congress, and they wished to combine the advantages of the British and the American practice. Suggestions to the same effect have been made by President Taft and many other American thinkers of note. In such cases, of course, the proposal is made from a different point of view, and is prompted by the desire to promote closer relations between the executive and the legislature. The principle that ministers, while being members of either house, may speak in either, is already accepted in Italy and has been adopted by the recently created legislature of Northern Ireland. Under the new constitution of the Irish Free State it is not necessary for the whole body of ministers to be members of either house of Parliament, but all ministers have the right of speech in the Chamber of Deputies. In Great Britain the theory that ministers of state should be drawn exclusively from the ranks of active politicians was temporarily abandoned under the stress of war conditions, and the cabinet was thus greatly strengthened by the addition of men, such as Mr. Fisher, Lord Rhondda, and Sir Eric Geddes, who had won distinction in other fields. Since party controversies were largely suspended during the war period, seats in the House were found for these gentlemen without difficulty, but it is obviously undesirable that the power of employing distinguished men in the highest

offices of state should be limited by the necessity of inducing some supporter of the government to surrender a "safe seat." Such arrangements usually involve an element of bargaining which comes dangerously near to corruption.

In the second place we might greatly strengthen the public councils of the nation by carrying out in good faith the intention of those statesmen who gave us a nominative senate. The method by which the Senate is at present recruited is wholly indefensible, and it has resulted in making the second chamber a practically negligible force in the structure of the Constitution. If we wish the Senate to be a negligible quantity, it would be better to follow the example of the provinces and abolish it altogether. If, on the other hand, we desire that it shall play a real and useful part in our politics, we should endeavor to make it really efficient for that purpose. Instead of filling the Senate with elderly politicians who wish to retire from the more vigorous activities of politics, we should regard it as a means for utilizing the services of men whom the conditions of party controversy exclude from the councils of the nation. Here again the founders of the Irish Constitution have set us a good example. The seats in the Irish Senate are (in the first instance) half elective and half nominative, and in the nomination of the original members the Irish government has proceeded upon the principle of selecting distinguished men and women who could never be expected

to become active politicians. Many of those nominated have in fact been political opponents of the present government. The exact words of the constitutional provision are as follows (Art. 29): "The Senate shall be composed of citizens who have done honor to the nation by reason of useful public service or who, because of special qualifications or attainments, represent important aspects of the nation's life." With regard to the first Senate it is directed that the president shall, "in making such nominations have special regard to the providing of representation for groups or parties not adequately represented in the Chamber." A second chamber of this kind would be genuinely representative, because it would represent important elements in the nation which find no spokesman under a rigorous application of the rules of party politics. We must remember that popular election is not the only method of attaining representative government, and that in some cases it may even defeat the principle. The executive right of nomination to the Senate may be made a most valuable means of ensuring a proper representation for minorities, provided that it is regarded as a public trust and not merely as a piece of political patronage.

Here again an important practical reform may be effected without any alteration in the law, and in so doing we should only be carrying out the intentions of those who provided for a nominated senate in the democratic Constitution of Canada.

Thirdly it may be suggested that the work done by our elected assemblies might be improved if we relaxed the executive control of the legislature in so far as this can be done without encroaching upon the fundamental doctrine of cabinet responsibility. The rule that a ministry which has definitely lost the confidence of the elected assembly should either resign or dissolve is essential to our whole system of government, and any change of practice which violated this rule would be revolutionary. At the same time it is true that the quality of the work done by Canadian legislatures undoubtedly suffers from our insistence upon the theory that the existence of the government is involved in almost every vote that is taken. This doctrine leads in practice to the enforcement of a rigid party discipline which has the effect of severely restricting the right of independent and helpful criticism on the part of individual members. The member says to himself, "I think the government proposal in this particular instance is very unwise, and I know I ought to resist it. Yet if I do so they will accuse me of disloyalty, and if I should succeed in carrying an adverse vote the government would dissolve the House, and we would all have to go through a general election, in which my motives would be misrepresented and I would probably not be returned. In any case it would cost me a lot of trouble and expense, and I should get the name of not being a loyal party man." In consequence the individual

member comes to be very dependent upon the orders of his party leaders, and the result is that men of the best type, who are unwilling to submit to such discipline, tend to be excluded from the legislatures. If we were to establish the principle that independent criticism and occasional opposition does not involve the existence of the cabinet, unless the issue of general confidence is clearly raised, we should undoubtedly attract a better class of men to our legistures and at the same time improve the quality of the work done.

If the breaking up of the traditional parties into new and changing groups becomes a feature of Canadian politics, it seems very likely that such a practice as I have suggested will speedily develop. The only alternative to this under the group system would be the acceptance of frequent changes of ministry, such as has been the practice in France, and it is unlikely that Canadian opinion would regard with favor a development so contrary to the general political tradition of the country. If the stability of the executive government is to be compatible with the existence of numerous political groups we shall be compelled to concede a much greater independence to the legislature, so that a ministry shall not be dismissed from office by any adverse vote that is not equivalent to a formal censure.

No political constitution, whether written or unwritten, is anywhere near perfect, and every scheme of government that was ever devised

contains within itself the possibilities of corruption and abuse. Bad precedents are easily established, and these precedents in their turn create interests which are naturally opposed to reform. The remedy for proved abuses does not lie in the enactment of legal safeguards or in the further elaboration of complex political machinery, for there is no rule of constitutional law which cannot be manipulated to serve some unworthy purpose, if its actual operation is entrusted to the wrong kind of men. The only real protection against political evils lies in the wide diffusion of political knowledge and in a vigorous and healthy public opinion always alert to demand that the national government shall be conducted with honesty, efficiency, and economy.

The true test of democracy lies not in the forms, but in the practice of government. Nothing is easier than to draft the text of a legal document containing solemn declarations of inalienable rights, provisions for universal suffrage, and elaborate schemes for obtaining a popular vote upon every imaginable question. The will of the people may succeed in expressing itself through these forms, or again it may not. The actual operation of the mechanism of government may in any particular case be controlled by party bosses, by wealthy corporations, by class organizations, or by special groups formed for the purpose of imposing their own fads upon the nation as a whole. Whenever this happens

the people are deprived of their power and democracy does not in fact exist.

This essay has been mainly devoted to the discussion and comparison of the principles underlying certain forms of government that have been instituted in North America. It is possible that some readers may thereby be misled into thinking that such forms are of great importance in themselves. I should therefore like to close this book by emphasizing as strongly as I can the fact that all political forms are merely the mechanism through which political power finds its expression. We must try to understand the mechanism, if we are to operate it successfully, and that is the only justification for the writing of such books as this. Certain forms of government may lend themselves more readily than others to the exercise of tyranny. Some forms may render it easier for dishonest men to act dishonestly. Others again are designed to serve the purposes of efficient and economical administration. But there is no form of government whatever that cannot be made to serve the ends of tyranny, dishonesty, and incompetence. To make the will of the people really prevail is the most difficult problem known to political science, and it has never yet been completely solved. So far as experience teaches us anything it would seem to indicate that in simplicity of government lies the best hope for real democracy. The people as a whole are simple, and if they are to control the mechanism of government it must in its main features

be easy enough for them to understand. Furthermore the issues presented to them for decision must be reasonably simple, not too numerous, and sufficiently important to compel the public interest. If the people is to be in reality, and not only in name, the final and supreme ruler, it is entitled to claim the most valuable prerogatives of supreme power. One of these is that it shall be served in the actual administration of government by the best men in the nation, and shall have the right to retain their services for so long as they prove themselves to be faithful and efficient. The other is that it shall only be asked to give its own decision upon a few great issues of policy duly presented to it upon solemn occasions. Of these two privileges it is being continually deprived by various means and for various ends. Nevertheless it must retain them if its will is to be supreme in the land.

APPENDIX I

THE CONSTITUTION OF THE UNITED STATES

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

[Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.][1] The actual enumeration shall be made within three years after the first meeting of the Congress

[1] Suspended by the 14th Amendment.

of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The Vice-President of the United States shall be

president of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such

parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of

both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince or foreign state.

SECTION 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war,

unless actually invaded, or in such imminent danger as will not admit of delay.

Article II

Section 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members

from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.][2]

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

[2] Superseded by the 12th Amendment.

SECTION 2. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdeamenors.

Article III

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No

person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Article IV

Section 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and

nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SECTION 4. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislature of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound

thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Article VII

The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

[Note. — The Constitution was adopted September 17, 1787, by the unanimous consent of the states present in the convention appointed in pursuance of the resolution of the Congress of the Confederation of February 21, 1787, and was ratified by the conventions of the several states, as follows, viz.: By convention of *Delaware*, December 7, 1787; *Pennsylvania*, December 12, 1787; *New Jersey*, December 18, 1787; *Georgia*, January 2, 1788; *Connecticut*, January 9, 1788; *Massachusetts*, February, 6 1788; *Maryland*, April 28, 1788; *South Carolina*, May 23, 1788; *New Hampshire*, June 21, 1788; *Virginia*, June 26, 1788; *New York*, July 26, 1788; *North Carolina*, November 21, 1789; *Rhode Island*, May 29, 1790.]

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several states, pursuant to the fifth article of the original Constitution.

Article I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition of the government for a redress of grievances.

Article II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Article III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

Article VI

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

[The first ten of the amendments were proposed at the first session of the first Congress of the United States, September 25, 1789, and were finally ratified by the constitutional number of states on December 15, 1791.]

Article XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States

by citizens or another state, or by citizens or subjects of any foreign state.

[Adopted January 8, 1798]

Article XII

The electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate;—The president of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if

such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

[Adopted September 25, 1804]

Article XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

[Adopted December 18, 1865]

Article XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers

of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proporton which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[Adopted July 28, 1868]

ARTICLE XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United

States or by any state on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

[Adopted March 30, 1870]

ARTICLE XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

[Adopted February 25, 1913]

ARTICLE XVII

The Senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

[Adopted May 31, 1913]

ARTICLE XVIII

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into,

or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

[Adopted January 29, 1919]

ARTICLE XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

[Adopted 1920]

APPENDIX II

THE CONSTITUTION OF CANADA

1. The British North America Act, 1867 (30-31, Vict., c. 3).
2. The British North America Act, 1871 (34-35, Vict., c. 28).
3. Parliament of Canada Act, 1875 (38-39, Vict., c. 38).
4. The British North America Act, 1886 (49-50, Vict., c. 35).
5. The British North America Act, 1907 (7, Edw. VII, c. 11).
6. The British North America Act, 1915 (5-6, Geo. V, c. 45).

THE BRITISH NORTH AMERICA ACT, 1867
(30 and 31, Victoria, c. 3)

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof and for purposes connected therewith.

Whereas the provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one dominion under the Crown of the United Kingdom of Great Britain and Ireland with a Constitution similar in principle to that of the United Kingdom:

And whereas such a Union would conduce to the welfare of the provinces and promote the interests of the British Empire:

And whereas on the establishment of the Union by authority of Parliament, it is expedient not only that

the Constitution of the legislative authority in the Dominion be provided for, but also that the nature of the exectuve government therein be declared:

And whereas it is expedient that provision be made for the eventual admission into the Union of other parts of British North America:

Be it therefore enacted and declared by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same as follows:

I. Preliminary

1. This act may be cited as *The British North America Act, 1867*.

2. The provisions of this act referring to Her Majesty the Queen extend also to the heirs and successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

II. Union

3. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, to declare by proclamation that on and after a day therein appointed, not being more than six months after the passing of this act, the provinces of Canada, Nova Scotia, and New Brunswick shall form and be one dominion under the name of Canada; and on and after that day those three provinces shall form and be one dominion under that name accordingly.

4. The subsequent provisions of this act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say on and after the day appointed for the Union taking effect in the Queen's proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this act.

5. Canada shall be divided into four provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

6. The parts of the Province of Canada (as it exists at the passing of this act) which formerly constituted respectively the provinces of Upper Canada and Lower Canada, shall be deemed to be severed, and shall form two separate provinces. The part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

7. The provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this act.

8. In the general census of the population of Canada, which is hereby required to be taken in the year one thousand eight hundred and seventy-one, and in every tenth year thereafter, the respective populations of the four provinces shall be distinguished.

III. Executive Power

9. The executive government and authority of and over Canada is hereby declared to continue and be vested the Queen.

10. The provisions of this act referring to the Governor-General extend and apply to the Governor-General for the time being of Canada, or other the chief excutive officer or administrator for the time being carrying on the government of Canada, on behalf and in the name of the Queen, by whatever title he is designated.

11. There shall be a council to aid and advise in the government of Canada, to be styled the Queen's Privy Council for Canada; and the persons who are to be members of that council shall be, from time to time, chosen and summoned by the Governor-General and sworn in as Privy Councillors, and members thereof may be, from time to time, removed by the Governor-General.

12. All powers, authorities, and functions which under any act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and

Ireland, or of the legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those provinces, with the advice, or with the advice and consent, of the respective executive councils thereof, or in conjunction with those councils or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the government of Canada, be vested in and exercisable by the Governor-General with the advice, or with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada or any members thereof or by the Governor-General individually, as the case requires, subject nevertheless (except with respect to such as exist under acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

13. The provisions of this act referring to the Governor-General in Council shall be construed as referring to the Governor-General acting by and with the advice of the Queen's Privy Council for Canada.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor-General from time to time to appoint any person or any persons jointly or severally to be his deputy or deputies within any part or parts of Canada, and in that capacity to exercise, during the pleasure of the Governor-General, such of the powers, authorities, and functions of the Governor-General as the Governor-General deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen; but the appointment of such a deputy or deputies shall not affect the exercise by the Governor-General himself of any power, authority or function.

15. The command-in-chief of the land and naval militia, and of all naval and military forces of and in

Canada, is hereby declared to continue and be vested in the Queen.

16. Until the Queen otherwise directs, the seat of government of Canada shall be Ottawa.

IV. Legislative Power

17. There shall be one Parliament for Canada, consisting of the Queen, an Upper House, styled the Senate, and the House of Commons.

18. The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the members thereof respectively, shall be such as are from time to time defined by act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the members thereof.

19. The Parliament of Canada shall be called together not later than six months after the Union.

20. There shall be a session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

The Senate

21. The Senate shall, subject to the provisions of this act, consist of seventy-two members, who shall be styled senators.

22. In relation to the constitution of the Senate, Canada shall be deemed to consist of three divisions:

(1) Ontario;

(2) Quebec;

(3) The Maritime provinces: Nova Scotia and New Brunswick; which three divisions shall (subject to the provisions of this act) be equally represented in the Senate as follows:—Ontario by twenty-four senators,

Quebec by twenty-four senators, and the Maritime Provinces by twenty-four senators, twelve thereof representing Nova Scotia and twelve thereof representing New Brunswick.

In the case of Quebec, each of the twenty-four senators representing that province shall be appointed for one of the twenty-four electoral divisions of Lower Canada specified in Schedule A to Chapter 1 of the Consolidated Statutes of Canada.

23. The qualifications of a senator shall be as follows:—

(1) He shall be of the full age of thirty years;

(2) He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalized by an act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the legislature of one of the provinces of Upper Canada, Lower Canada, Nova Scotia, or New Brunswick before the Union, or of the Parliament of Canada after the Union;

(3) He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common soccage, or seised or possessed for his own use and benefit of lands or tenements held in franc-alleu or in roture, within the province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due, or payable out of or charged on or affecting the same;

(4) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities;

(5) He shall be a resident in the province for which he is appointed;

(6) In the case of Quebec he shall have his real property qualification in the electoral division for which he is appointed or shall be resident in that division.

24. The Governor-General shall from time to time, in the Queen's name by instrument under the Great Seal

of Canada, summon qualified persons to the Senate; and, subject to the provisions of this act, every person so summoned shall become and be a member of the Senate and a senator.

25. Such persons shall be first summoned to the Senate as the Queen by warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.

26. If at any time, on the recommendation of the Governor-General, the Queen thinks fit to direct that three or six members be added to the Senate, the Governor-General may by summons to three or six qualified persons (as the case may be) representing equally the three divisions of Canada, add to the Senate accordingly.

27. In case of such addition being at any time made, the Governor-General shall not summon any person to the Senate, except on a further like direction by the Queen on the like recommendation, until each of the three divisions of Canada is represented by twenty-four senators and no more.

28. The number of senators shall not at any time exceed seventy-eight.

29. A senator shall, subject to the provisions of this act, hold his place in the Senate for life.

30. A senator may by writing under his hand, addressed to the Governor-General, resign his place in the Senate, and thereupon the same shall be vacant.

31. The place of a senator shall become vacant in any of the following cases:—

(1) If for two consecutive sessions of the Parliament he fails to give his attendance in the Senate;

(2) If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a foreign power, or does a act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen of a foreign power;

(3) If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter;

4. If he is attainted of treason or convicted of felony, or of any infamous crime.

5. If he ceases to be qualified in respect of property or residence; provided that a senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the seat of government of Canada while holding an office under that government requiring his presence there.

32. When a vacancy happens in the Senate by resignation, death, or otherwise, the Governor-General shall by summons to a fit and qualified person fill the vacancy.

33. If any question arises respecting the qualification of a senator or a vacancy in the Senate, the same shall be heard and determined by the Senate.

34. The Governor-General may from time to time, by instrument under the Great Seal of Canada, appoint a senator to be Speaker of the Senate, and may remove him and appoint another in his stead.

35. Until the Parliament of Canada otherwise provides, the presence of at least fifteen senators, including the Speaker, shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

36. Questions arising in the Senate shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

The House of Commons.

37. The House of Commons shall, subject to the provisions of this Act, consist of one hundred and eighty-one members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick.

38. The Governor-General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon and call together the House of Commons.

39. A senator shall not be capable of being elected or of sitting or voting as a member of the House of Commons.

40. Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the purposes of the election of members to serve in the House of Commons, be divided into electoral districts as follows: —

1. ONTARIO

Ontario shall be divided into the counties, ridings of counties, cities, parts of cities, and towns enumerated in the first schedule to this act, each whereof shall be an electoral district, each such district as numbered in that schedule being entitled to return one member.

2. QUEBEC

Quebec shall be divided into sixty-five electoral districts, composed of the sixty-five electoral divisions into which Lower Canada is at the passing of this act divided under chapter two of the Consolidated Statutes of Canada, chapter seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the twenty-third year of the Queen, chapter one, or any other act amending the same in force at the Union, so that each such electoral division shall be for the purposes of this act an electoral district entitled to return one member.

3. NOVA SCOTIA

Each of the eighteen counties of Nova Scotia shall be an electoral district. The County of Halifax shall be entitled to return two members, and each of the other counties one member.

4. NEW BRUNSWICK

Each of the fourteen counties into which New Brunswick is divided, including the City and County of St. John, shall be an electoral district. The City of St. John shall also be a separate electoral district. Each

of those fifteen electoral districts shall be entitled to return one member.

41. Until the Parliament of Canada otherwise provides all laws in force in the several provinces of the Union, relative to the following matters or any of them, namely: — the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the several provinces, the voters at election of such members; the oaths to be taken by voters; the returning officers, their powers and duties, the proceedings at elections; the periods during which elections may be continued, the trial of controverted elections and proceedings incident thereto, the vacating of seats of members, and the execution on new writs in cases of seats vacated otherwise than by dissolution, — shall respectively apply to elections of members to serve in the House of Commons for the same several provinces. Provided that until the Parliament of Canada otherwise provides, at any election for a member of the House of Commons for the District of Algoma, in additon to persons qualified by the law of the Province of Canada to vote, every male British subject, aged twenty-one years or upwards, being a householder, shall have a vote.

42. For the first election of members to serve in the House of Commons, the Governor-General shall cause writs to be issued by such person, in such form, and addressed to such returning officers as he thinks fit. The person issuing writs under this section shall have the like powers as are possessed at the Union by the officers charged with the issuing of writs for the election of members to serve in the respective House of Assembly or Legislative Assembly of the provinces of Canada, Nova Scotia, or New Brunswick; and the returning officers to whom writs are directed under this section shall have the like powers as are possessed at the Union by the officers charged with the returning of writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.

43. In case a vacancy in the representation in the House of Commons of any electoral district happens before the meeting of the Parliament, or after the meeting of the Parliament before provision is made by the Parliament in this behalf, the provisions of the last foregoing section of this act shall extend and apply to the issuing and returning of a writ in respect of such vacant district.

44. The House of Commons on its first assembling after a general election shall proceed with all practicable speed to elect one of its members to be speaker.

45. In case of a vacancy happening in the office of speaker by death, resignation, or otherwise, the House of Commons shall with all practicable speed proceed to elect another of its members to be speaker.

46. The speaker shall preside at all meetings of the House of Commons.

47. Until the Parliament of Canada otherwise provides, in case of the absence for any reason of the speaker from the chair of the House of Commons for a period of forty-eight consecutive hours, the House may elect another of its members to act as speaker, and the member so elected shall, during the continuance of such absence of the speaker, have and execute all the powers, privileges, and duties of speaker.

48. The presence of at least twenty members of the House of Commons shall be necessary to constitute a meeting of the House for the exercise of its powers, and for that purpose the speaker shall be reckoned as a member.

49. Questions arising in the House of Commons shall be decided by a majority of voices other than that of the speaker, and when the voices are equal, but not otherwise, the speaker shall have a vote.

50. Every House of Commons shall continue for five years from the day of the return of the writs for choosing the House (subject to be sooner dissolved by the Governor-General) and no longer.

51. On the completion of the census in the year one thousand eight hundred and seventy-one, and of each

subsequent decennial census, the representation of the four provinces shall be readjusted by such authority in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:—

(1) Quebec shall have the fixed number of sixty-five members;

(2) There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained);

(3) In the computation of the number of members for a province, a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall be disregarded; but a fractional part exceeding one-half of that number shall be equivalent to the whole number:

(4) On any such readjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the province is ascertained at the then latest census, to be diminished by one-twentieth part or upwards:

(5) Such readjustment shall not take effect until the termination of the then existing Parliament.

52. The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the provinces prescribed by this act is not thereby disturbed.

Money Votes; Royal Assent

53. Bills for appropriaitng any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons.

54. It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose, that has not been first recommended to that House by message of the Governor-General in the session in which such vote, resolution, address, or bill is proposed.

55. Where a bill passed by the houses of Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure.

56. Where the Governor-General assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the act to one of Her Majesty's principal secretaries of state, and if the Queen in Council within two years after receipt thereof by the secretary of state thinks fit to disallow the act, such disallowance (with certificate of the secretary of state of the day on which the act was received by him) being signified by the Governor-General, by speech or message to each of the houses of the Parliament or by proclamation, shall annul the act from and after the day of such signification.

57. A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent, the Governor-General signifies, by speech or message to each of the houses of the Parliament or by proclamation, that it has received the assent of the Queen in Council.

An entry of every such speech, message, or proclamation shall be made in the journal of each house and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the records of Canada.

V. Provincial Constitutions

Executive Power

58. For each province there shall be an officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by instrument under the Great Seal of Canada.

59. A Lieutenant-Governor shall hold office during the pleasure of the Governor-General; but any Lieutenant-Governor appointed after the commencement of the first session of the Parliament of Canada shall not be removable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message to the Senate and to the House of Commons within one week thereafter if the Parliament is then sitting, and if not then, within one week after the commencement of the next session of the Parliament.

60. The salaries of the Lieutenant-Governors shall be fixed and provided by the Parliament of Canada.

61. Every Lieutenant-Governor shall, before assuming the duties of his office make and subscribe before the Governor-General or some person authorized by him, oaths of allegiance and office similar to those taken by the Governor-General.

62. The provisions of this act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the time being of each province or other the chief executive officer or administrator for the time being carrying on the government of the province, by whatever title he is designated.

63. The Executive Council of Ontario and of Quebec shall be composed of such persons as the Lieutenant-Governor from time to time thinks fit, and in the first instance of the following officers, namely: the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and

Public Works, with, in Quebec, the Speaker of the Legislative Council and the Solicitor-General.

64. The constitution of the executive authority in each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this act, continue as it exists at the Union until altered under the authority of this act.

65. All powers, authorities, and functions which under any act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those councils or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the advice, or with the advice and consent of or in conjunction with the respective Executive Councils or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be abolished or altered by the respective legislatures of Ontario and Quebec.

66. The provisions of this act referring to the Lieutenant-Governor in Council shall be construed as referring to the Lieutenant-Governor of the province acting by and with the advice of the Executive Council thereof.

67. The Governor-General in Council may from time to time appoint an administrator to execute the office and functions of Lieutenant-Governor during his absence, illness, or other inability.

68. Unless and until the executive government of any province otherwise directs with respect to that province, the seats of government of the provinces shall be as follows, namely, — of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

Legislative Power

1. ONTARIO

69. There shall be a legislature for Ontario, consisting of the Lieutenant-Governor and of one house styled the Legislative Assembly of Ontario.

70. The Legislative Assembly of Ontario shall be composed of eighty-two members, to be elected to represent the eighty-two electoral districts set forth in the first schedule to this act.

2. QUEBEC

71. There shall be a legislature for Quebec, consisting of Lieutenant-Governor and of two houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

72. The Legislative Council of Quebec shall be composed of twenty-four members, to be appointed by the Lieutenant-Governor in the Queen's name by instrument under the Great Seal of Quebec, one being appointed to represent each of the twenty-four electoral divisions of Lower Canada in this act referred to, and each holding office for the term of his life, unless the legislature of Quebec otherwise provides under the provisions of this act.

73. The qualifications of the legislative councillors of Quebec shall be the same as those of the senators for Quebec.

74. The place of a legislative councillor of Quebec shall become vacant in the cases, *mutatis mutandis*, in which the place of senator becomes vacant.

75. When a vacancy happens in the Legislative Council of Quebec by resignation, death, or otherwise, the Lieutenant-Governor, in the Queen's name, by instrument under the Great Seal of Quebec, shall appoint a fit and qualified person to fill the vacancy.

76. If any question arises respecting the qualification of a legislative councillor of Quebec, or a vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

77. The Lieutenant-Governor may, from time to time, by instrument under the Great Seal of Quebec, appoint a member of the Legislative Council of Quebec, to be speaker thereof, and may remove him and appoint another in his stead.

78. Until the legislature of Quebec otherwise provides, the presence of at least ten members of the Legislative Council, including the speaker, shall be necessary to constitute a meeting for the exercise of its powers.

79. Questions arising in the Legislative Council of Quebec shall be decided by a majority of voices, and the speaker shall in all cases have a vote, and when the voices are equal, the decision shall be deemed to be in the negative.

80. The Legislative Assembly of Quebec shall be composed of sixty-five members, to be elected to represent the sixty-five electoral divisions or districts of Lower Canada in this act referred to, subject to alteration thereof by the legislature of Quebec: provided that it shall not be lawful to present to the Lieutenant-Governor of Quebec for assent any bill for altering the limits of any of the electoral divisions or districts mentioned in the second schedule to this act, unless the second and third readings of such bill have been passed in the Legislative Assembly with the concurrence of the majority of the members representing all those electoral divisions or districts, and the assent shall not be given to such bill unless an address has been presented by the Legislative Assembly to the Lieutenant-Governor, stating that it has been so passed.

3. ONTARIO AND QUEBEC

81. The legislatures of Ontario and Quebec respectively shall be called together not later than six months after the Union.

82. The Lieutenant-Governor of Ontario and of Quebec shall, from time to time, in the Queen's name, by instrument under the Great Seal of the province, summon and call together the Legislative Assembly of the province.

83. Until the legislature of Ontario and of Quebec otherwise provides, a person accepting or holding in Ontario or in Quebec any office, commission, or employment, permanent or temporary at the nomination of the Lieutenant-Governor, to which an annual salary, or any fee, allowance, emolument, or profit of any kind or amount whatever from the province is attached, shall not be eligible as a member of the Legislative Assembly of the respective province, nor shall he sit or vote as such; but nothing in this section shall make ineligible any person being a member of the Executive Council of the respective province, or holding any of the following offices, that is to say: — the offices of Attorney-General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec Solicitor-General, or shall disqualify him to sit or vote in the house for which he is elected, provided he is elected while holding such office.

84. Until the legislatures of Ontario and Quebec respectively otherwise provide, all laws which at the Union are in force in those provinces respectively, relative to the following matters or any of them, namely, — the qualifications and disqualifications of persons to be elected or to sit or vote as members of the Assembly of Canada, the qualifications or disqualifications of voters, the oaths to be taken by voters, the returning officers, their powers and duties, the proceedings at elections, the periods during which such elections may be continued, and the trial of controverted elections and the

proceedings incident thereto, the vacating of the seats of members, and the issuing and execution of new writs in case of seats vacated otherwise than by dissolution, shall respectively apply to elections of members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that until the legislature of Ontario otherwise provides, at any election for a member of the Legislative Assembly of Ontario for the District of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject aged twenty-one years or upwards, being a householder, shall have a vote.

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for four years from the day of the return of the writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant-Governor of the province), and no longer.

86. There shall be a session of the legislature of Ontario and of that of Quebec once at least in every year, so that twelve months shall not intervene between the last sitting of the legislature in each province in one session and its first sitting in the next session.

87. The following provisions of this act respecting the House of Commons of Canada, shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say,—the provisions relating to the election of a speaker originally and on vacancies, the duties of the speaker, the absence of the speaker, the quorum, and the mode of voting, as if those provisions were here re-enacted and made applicable in terms to each such Legislative Assembly.

4. NOVA SCOTIA AND NEW BRUNSWICK

88. The constitution of the legislature of each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this act, continue

as it exists at the Union until altered under the authority of this act; and the House of Assembly of New Brunswick existing at the passing of this act, unless sooner dissolved, continue for the period for which it was elected.

5. ONTARIO, QUEBEC, AND NOVA SCOTIA

89. Each of the Lieutenant-Governors of Ontario, Quebec, and Nova Scotia, shall cause writs to be issued for the first election of members of the Legislative Assembly thereof in such form and by such person as he thinks fit, and at such time and addressed to such returning officer as the Governor-General directs, and so that the first election of member of Assembly for any electoral district or any subdivision thereof shall be held at the same time and at the same places as the election for a member to serve in the House of Commons of Canada for that electoral district.

6. THE FOUR PROVINCES

90. The following provisions of this act respecting the Parliament of Canada, namely, — the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of acts, and the signification of pleasure on bills reserved, — shall extend and apply to the legislatures of the several provinces as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the legislatures thereof, with the substitution of the Lieutenant-Governor of the province for the Governor-General, of the Governor-General for Queen and for a Secretary of State, of one year for two years and of the Province of Canada.

VI. Distribution of Legislative Powers

Powers of the Parliament

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons,

to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:

1. The public debt and property:
2. The regulation of trade and commerce:
3. The raising of money by any mode or system of taxation:
4. The borrowing of money on the public credit:
5. Postal service:
6. The census and statistics:
7. Militia, military and naval service, and defense:
8. The fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada:
9. Beacons, buoys, lighthouses, and Sable Island:
10. Navigation and shipping:
11. Quarantine and the establishment and maintenance of marine hospitals:
12. Sea coast and inland fisheries:
13. Ferries between a province and any British or foreign country, or between two provinces:
14. Currency and coinage:
15. Banking, incorporation of banks, and the issue of paper money:
16. Savings banks:
17. Weights and measures:
18. Bills of exchange and promissory notes:
19. Interest:
20. Legal tender:
21. Bankruptcy and insolvency:
22. Patents of invention and discovery:
23. Copyrights:

24. Indians and lands reserved for the Indians:
25. Naturalization and aliens:
26. Marriage and divorce:
27. The criminal law, except the constitution of the courts of criminal jurisdiction, but including the procedure in criminal matters:
28. The establishment, maintenance and management of penitentiaries:
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces:

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces.

Exclusive Powers of Provincial Legislatures

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say: —

1. The amendment from time to time, notwithstanding anything in this act, of the Constitution of the province, except as regards the office of Lieutenant-Governor:
2. Direct taxation within the province in order to the raising of a revenue for provincial purposes:
3. The borrowing of money on the sole credit of the province:
4. The establishment and tenure of provincial offices and the appointment and payment of provincial officers:
5. The management and sale of the public lands belonging to the province, and of the timber and wood thereon:

6. The establishment, maintenance, and management of public and reformatory prisons in and for the province:
7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals:
8. Municipal institutions in the province:
9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes:
10. Local works and undertakings, other than such as are of the following classes:
    a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province:
    b. Lines of steamships between the province and any British or foreign country:
    c. Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces:
11. The incorporation of companies with provincial objects:
12. The solemnization of marriage in the province:
13. Property and civil rights in the province:
14. The administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts:
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section:

16. Generally all matters of a merely local or private nature in the province.

Education

93. In and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union:

(2) All the powers, privileges, and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects, shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec;

(3) Where in any province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the legislature of the province, an appeal shall lie to the Governor-General in Council from any act of decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education;

(4) In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick

94. Notwithstanding anything in this act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the courts in those three provinces, and from and after the passing of any act in that behalf, the power of the Parliament of Canada to make laws in relation to any matter comprised in any such act shall, notwithstanding anything in this act, be unrestricted; but any act of the Parliament of Canada making provision for such uniformity shall not have effect in any province unless and until it is adopted and enacted as law by the legislature thereof.

Agriculture and Immigration

95. In each province the legislature may make laws in relation to agriculture in the province, and to immigration into the province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any of the provinces, and to immigration into all or any of the provinces; and any law of the legislature of a province, relative to agriculture or to immigration, shall have effect in and for the province as long and as far only as it is not repugnant to any act of the Parliament of Canada.

VII. Judicature

96. The Governor-General shall appoint the judges of the Superior, District, and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and the procedure of the courts in those provinces, are made uniform, the judges of the courts of those provinces

appointed by the Governor-General shall be selected from the respective bars of those provinces.

98. The judges of the courts of Quebec shall be selected from the bar of that province.

99. The judges of the Superior Courts shall hold office during good behavior, but shall be removable by the Governor-General on address of the Senate and House of Commons.

100. The salaries, allowances, and pensions of the judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

101. The Parliament of Canada may, notwithstanding anything in this act, from time to time, provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

VIII. Revenues; Debts; Assets; Taxation

102. All duties and revenues over which the respective legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union, had and have power of appropriation, except such portions thereof as are by this act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this act provided.

103. The Consolidated Revenue Fund of Canada shall be permanently charged with the costs, charges, and expenses incident to the collection, management, and receipt thereof, and the same shall form the first charge thereon subject to be reviewed and audited in such manner as shall be ordered by the Governor-General in Council until the Parliament otherwise provides.

104. The annual interest of the public debts of the several provinces of Canada, Nova Scotia and New Brunswick at the Union shall form the second charge on the Consolidated Revenue Fund of Canada.

105. Unless altered by the Parliament of Canada, the salary of the Governor-General shall be ten thousand pounds sterling money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the third charge thereon.

106. Subject to the several payments by this act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the public service.

107. All stocks, cash, bankers' balances, and securities for money belonging to each province at the time of the Union, except as in this act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the provinces at the Union.

108. The public works and property of each province enumerated in the third schedule of this act shall be the property of Canada.

109. All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

110. All assets connected with such portions of the public debt of each province as are assumed by that province shall belong to that province.

111. Canada shall be liable for the debts and liabilities of each province existing at the Union.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of

the province of Canada exceeds at the Union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

113. The assets enumerated in the fourth schedule to this act, belonging at the Union to the Province of Canada, shall be the property of Ontario and Quebec conjointly.

114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

115. New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

116. In case the public debts of Nova Scotia and New Brunswick do not at the Union amount to eight million and seven million dollars respectively, they shall respectively receive, by half-yearly payments in advance from the government of Canada, interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

117. The several provinces shall retain all their respective public property not otherwise disposed of in this act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defense of the country.

118. The following sums shall be paid yearly by Canada to the several provinces for the support of their governments and legislatures: —

	Dollars
Ontario	Eighty thousand
Quebec	Seventy thousand
Nova Scotia	Sixty thousand
New Brunswick	Fifty thousand
	Two hundred and sixty thousand;

and an annual grant in aid of each province shall be

made, equal to eighty cents per head of the population as ascertained by the census of one thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each province; but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this act.

119. New Brunswick shall receive, by half-yearly payments in advance from Canada, for the period of ten years from the Union, an additional allowance of sixty-three thousand dollars per annum; but as long as the public debt of that province remains under seven million dollars, a deduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of sixty-three thousand dollars.

120. All payments to be made under this act, or in discharge of liabilities created under any act of the provinces of Canada, Nova Scotia, and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Canada otherwise directs, be made in such form and manner as may from time to time be ordered by the Governor-General in Council.

121. All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces.

122. The customs and excise laws of each province shall, subject to the provisions of this act, continue in force until altered by the Parliament of Canada.

123. Where customs duties are, at the Union, leviable on any goods, wares, or merchandises in any two provinces, those goods, wares, and merchandises may

from and after the Union, be imported from one of those provinces into the other of them, on proof of payment of the customs duty leviable thereon in the province of exportation, and on payment of such further amount (if any) of customs duty as is leviable thereon in the province of importation.

124. Nothing in this act shall affect the right of New Brunswick to levy the lumber dues provided in chapter fifteen of title three of the Revised Statutes of New Brunswick, or in any act amending that act before or after the Union, and not increasing the amount of such dues; but the lumber of any of the provinces other than New Brunswick shall not be subject to such dues.

125. No lands or property belonging to Canada or any province shall be liable to taxation.

126. Such portions of the duties and revenues over which the respective legislatures of Canada, Nova Scotia, and New Brunswick had before the Union power of appropriation, as are by this act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this act, shall in each province form one Consolidated Revenue Fund to be appropriated for the public service of the province.

IX. Miscellaneous Provisions

General

127. If any person being at the passing of this act, a member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a place in the Senate is offered, does not within thirty days thereafter, by writing under his hand, addressed to the Governor-General of the Province of Canada or to the Lieutenant-Governor of Nova Scotia or New Brunswick (as the case may be) accept the same, he shall be deemed to have declined the same; and any person who, being at the

passing of this act a member of the Legislative Council of Nova Scotia or New Brunswick, accepts a place in the Senate, shall thereby vacate his seat in such Legislative Council.

128. Every member of the Senate or House of Commons of Canada shall, before taking his seat therein, take and subscribe before the Governor-General or some person authorized by him, and every member of a Legislative Council or Legislative Assembly of any province shall, before taking his seat therein, take and subscribe before the Lieutenant-Governor of the province, or some person authorized by him, the oath of allegiance contained in the fifth schedule to this act; and every member of the Senate of Canada and every member of the Legislative Council of Quebec shall also, before taking his seat therein, take and subscribe before the Governor-General, or some person authorized by him, the declaration of qualification contained in the same schedule.

129. Except as otherwise provided by this act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the Union, shall continue, in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective province, according to the authority of the Parliament or of that legislature under this act.

130. Until the Parliament of Canada otherwise provides, all officers of the several provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this act

assigned exclusively to the legislatures of the provinces shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities, and penalties as if the Union had not been made.

131. Until the Parliament of Canada otherwise provides, the Governor-General in Council may from time to time appoint such officers as the Governor-General in Council deems necessary or proper for the effectual execution of this act.

132. The Parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

133. Either the English or the French language may be used by any person in the debates of the houses of the Parliament of Canada and of the houses of the legislature of Quebec; and both those languages shall be used in the respective records and journals of those houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any court of Canada established under this act, and in or from all or any of the courts of Quebec.

The acts of the Parliament of Canada and of the legislature of Quebec shall be printed and published in both those languages.

Ontario and Quebec

134. Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant-Governors of Ontario and Quebec may each appoint, under the Great Seal of the Province, the following officers, to hold office during pleasure, that is to say, — the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the case of Quebec the Solicitor-General; and may, by

order of the Lieutenant-Governor in Council, from time to time prescribe the duties of those officers, and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof; and may also appoint other and additional officers to hold office during pleasure, and may from time to time prescribe the duties of those officers, and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof.

135. Until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities, or authorities at the passing of this act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver-General, by any law, statute, or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the duties and functions of the office of Minister of Agriculture at the passing of this act imposed by the law of the Province of Canada as well as those of the Commissioner of Public Works.

136. Until altered by the Lieutenant-Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the same design, as those used in the provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

137. The words "and from thence to the end of the then next ensuing session of the Legislature," or words to the same effect used in any temporary act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next session of the Parliament of Canada, if the subject-matter of

the act is within the powers of the same as defined by this act, or to the next sessions of the Legislatures of Ontario and Quebec respectively, if the subject-matter of the act is within the powers of the same as defined by this act.

138. From and after the Union the use of the words "Upper Canada," instead of "Ontario," or "Lower Canada," instead of "Quebec," in any deed, writ, process, pleading, document, matter, or thing shall not invalidate the same.

139. Any proclamation under the Great Seal of the Province of Canada, issued before the Union, to take effect at a time which is subsequent to the Union, whether relating to that province, or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed, shall be and continue of like force and effect as if the Union had not been made.

140. Any proclamation which is authorized by any act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada, whether relating to that province, or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant-Governor of Ontario or of Quebec, as its subject-matter requires, under the Great Seal thereof; and from and after the issue of such proclamation the same and the several matters and things therein proclaimed shall be and continue of the like force and effect in Ontario or Quebec as if the union had not been made.

141. The penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the penitentiary of Ontario and Quebec.

142. The division and adjustment of the debts, credits, liabilities, properties, and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the government of Ontario, one by the government of Quebec, and one by the government of Canada; and

the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the government of Canada shall not be a resident either in Ontario or in Quebec.

143. The Governor-General in Council may from time to time order that such and so many of the records, books and documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the property of that province; and any copy thereof or extract therefrom, duly certified by the officer having charge of the original thereof, shall be admitted as evidence.

144. The Lieutenant-Governor of Quebec may from time to time, by proclamation under the Great Seal of the province, to take effect from a day to be appointed therein, constitute townships in those parts of the Province of Quebec in which townships are not then already constituted, and fix the metes and bounds thereof.

X. Intercolonial Railway

145. Inasmuch as the Province of Canada, Nova Scotia, and New Brunswick have joined in a declaration that the construction of the Intercolonial Railway is essential to the consolidatoin of the Union of British North America, and to the assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that provision should be made for its immediate construction by the government of Canada: Therefore, in order to give effect to that agreement, it shall be the duty of the government and Parliament of Canada to provide for the commencement, within six months after the Union, of a railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the construction thereof without intermission, and the completion thereof with all practicable speed.

XI. Admission of Other Colonies

146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on addresses from the houses of the Parliament of Canada, and from the houses of the respective legislatures of the colonies or provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those colonies or provinces, or any of them, into the Union, and on address from the houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this act; and the provisions of any order in council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

147. In case of the admission of Newfoundland and Prince Edward Island or either of them, each shall be entitled to a representation, in the Senate of Canada, of four members, and (notwithstanding anything in this act) in case of the admission of Newfoundland the normal number of senators shall be seventy-six and their maximum number shall be eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the three divisions into which Canada is, in relation to the constitution of the Senate, divided by this act, and accordingly, after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the representation of Nova Scotia and New Brunswick in the Senate shall, as vacancies occur, be reduced from twelve to ten members respectively, and the representation of each of those provinces shall not be increased at any time beyond ten, except under the provisions of this act, for the appointment of three or six additional senators under the direction of the Queen.

Note.—The schedules of the B. N. A. Act are omitted as unnecessary for the purposes of this volume.

2. THE BRITISH NORTH AMERICA ACT, 1871 (34 & 35, Victoria, c. 28)

An Act respecting the Establishment of Provinces in the Dominion of Canada

Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish provinces in territories admitted, or which may hereafter be admitted, into the Dominion of Canada, and to provide for the representation of such provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. This act may be cited for all purposes as *The British North America Act, 1871*.

2. The Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order and good government of such province, and for its representation in the said Parliament.

3. The Parliament of Canada may from time to time, with the consent of the legislature of any province of the said Dominion, increase, diminish, or otherwise alter the limits of such province, upon such terms and conditions as may be agreed to by the said legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any province affected thereby.

4. The Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any province.

5. The following acts passed by the said Parliament of Canada, and intituled respectively:

"An Act for the temporary government of Rupert's Land and the Northwestern Territory when united with Canada," and

"An Act to amend and continue the act thirty-two and thirty-three, Victoria, chapter three, and to establish and provide for the government of the Province of Manitoba,"

shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor-General of the said Dominion of Canada.

6. Except as provided by the third section of this act, it shall not be competent for the Parliament of Canada to alter the provisions of the last mentioned act of the said Parliament in so far as it relates to the Province of Manitoba or of any other act hereafter establishing new provinces in the said Dominion, subject always to the right of the legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said province.

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3. PARLIAMENT OF CANADA ACT, 1875
(38 & 39, Victoria, c. 38)

An Act to remove certain doubts with respect to the powers of the Parliament of Canada, under Section 18 of the British North America Act, 1867.

Whereas by section 18 of *The British North America Act, 1867* it is provided as follows:—"The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by act of the Parliament of Canada, but so that the same shall never exceed those at

the passing of this act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof."

And whereas doubts have arisen with regard to the power of defining by an act of the Parliament of Canada, in pursuance of the said section, the said privileges, powers or immunities; and it is expedient to remove such doubts:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: —

1. Section 18 of *The British North America Act, 1867*, is hereby repealed, without prejudice to anything done under that section, and the following section shall be substituted for the section so repealed: —

The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by act of the Parliament of Canada, but so that any act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

2. The act of the Parliament of Canada passed on the thirty-first year of the reign of her present Majesty, chapter twenty-four, intituled *An Act to provide for oaths to witnesses being administered in certain cases for the purposes of either House of Parliament*, shall be deemed to be valid, and to have been valid as from the date at which the royal assent was given thereto by the Governor-General of the Dominion of Canada.

3. This act may be cited as *The Parliament of Canada Act, 1875*.

4. THE BRITISH NORTH AMERICA ACT, 1886 (49 & 50, Victoria, c. 35)

An Act respecting the Representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any Province.

Whereas it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House of Commons of Canada, or either of them, of any territory which for the time being forms part of the Dominion of Canada, but is not included in any province:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in the present Parliament assembled, and by the authority of the same, as follows:

1. The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.

2. Any act passed by the Parliament of Canada, before the passing of this act for the purpose mentioned in this act, shall, if not disallowed by the Queen, be, and shall be deemed to have been, valid and effectual from the date at which it received the assent, in Her Majesty's name, of the Governor-General of Canada.

It is hereby declared that any act passed by the Parliament of Canada, whether before or after the passing of this act, for the purpose mentioned in this act, or in *The British North America Act, 1871*, has effect, notwithstanding anything in *The British North America Act, 1867*, and the number of Senators or the number of members of the House of Commons specified in the last-mentioned act is increased by the number of senators

or of members, as the case may be, provided by any such act of the Parliament of Canada for the representation of any provinces or territories of Canada.

3. This act may be cited as *The British North America Act, 1886.*

This act, and *The British North America Act, 1867,* and *The British North America Act, 1871,* shall be construed together, and may be cited together as *The British North America Acts, 1867 to 1886.*

5. THE BRITISH NORTH AMERICA ACT, 1907 (7, Edward VII, c. 11)

An Act to make further provision with respect to the sums to be paid by Canada to the several Provinces of the Dominion.

Whereas an address has been presented to His Majesty by the Senate and Commons of Canada in the terms set forth in the schedule to this act:

Be it therefore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) The following grants shall be made yearly by Canada to every province, which at the commencement of this act is a province of the Dominion, for its local purposes and the support of its government and legislature:

(a) A fixed grant —

Where the population of the province is under one hundred and fifty thousand, of one hundred thousand dollars;

Where the population of the province is one hundred and fifty thousand, but does not exceed two hundred thousand, of one hundred and fifty thousand dollars;

Where the population of the province is two hundred thousand, but does not exceed four

hundred thousand, of one hundred and eighty thousand dollars;

Where the population of the province is four hundred thousand, but does not exceed eight hundred thousand, of one hundred and ninety thousand dollars;

Where the population of the province is eight hundred thousand, but does not exceed one million five hundred thousand, of two hundred and twenty thousand dollars;

Where the population of the province exceeds one million five hundred thousand, of two hundred and forty thousand dollars; and

(b) Subject to the special provisions of this act as to the provinces of British Columbia and Prince Edward Island, a grant at the rate of eighty cents per head of the population of the province up to the number of two million five hundred thousand, and at the rate of sixty cents per head of so much of the population as exceeds that number.

(2) An additional grant of one hundred thousand dollars shall be made yearly to the Province of British Columbia for a period of ten years from the commencement of this act.

(3) The population of a province shall be ascertained from time to time in the case of the provinces of Manitoba, Saskatchewan, and Alberta respectively by the last quinquennial census of statutory estimate of population made under the acts establishing those provinces or any other act of the Parliament of Canada making provision for the purpose, and in the case of any other province by the last decennial census for the time being.

(4) The grants payable under this act shall be paid half-yearly in advance to each province.

(5) The grants payable under this act shall be substituted for the grants or subsidies (in this act referred to as existing grants) payable for the like purposes at the commencement of this act to the several provinces of the Dominion under the provisions of section one

hundred and eighteen of the British North America Act, 1867, or of any Order in Council establishing a province, or of any act of the Parliament of Canada containing directions for the payment of any such grant or subsidy, and those provisions shall cease to have effect.

(6) The government of Canada shall have the same power of deducting sums charged against a province on account of the interest on public debt in the case of the grant payable under this act to the province as they have in the case of the existing grant.

(7) Nothing in this act shall affect the obligation of the government of Canada to pay to any province any grant which is payable to that province, other than the existing grant for which the grant under this act is substituted.

(8) In case of the provinces of British Columbia and Prince Edward Island, the amount paid on account of the grant payable per head of the population to the provinces under this act shall not at any time be less than the amount of the corresponding grant payable at the commencement of this act; and if it is found on any decennial census that the population of the province has decreased since the last decennial census, the amount paid on account of the grant shall not be decreased below the amount then payable, notwithstanding the decrease of the population.

2. This act may be cited as the British North America Act, 1907, and shall take effect as from the first day of July nineteen hundred and seven.

6. THE BRITISH NORTH AMERICA ACT, 1915 (5 & 6, George V, c. 45.)

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) Notwithstanding anything in the British North America Act, 1867, or in any act amending the

same, or in any Order in Council or terms or conditions of union made or approved under the said acts or in any act of the Canadian Parliament —

(i) The number of senators provided for under section twenty-one of the British North America Act, 1867, is increased from seventy-two to ninety-six.

(ii) The divisions of Canada in relation to the constitution of the Senate provided for by section twenty-two of the said act are increased from three to four, the forth division to comprise fhe Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta, which four divisions shall (subject to the provisions of the said act and of this act) be equally represented in the Senate, as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan and six thereof representing Alberta:

(iii) The number of persons whom by section twenty-six of the said act the Governor-General of Canada may, upon the direction of His Majesty the King, add to the Senate is increased from three or six to four or eight, representing equally the four divisions of Canada:

(iv) In case of such addition being at any time made the Governor-General of Canada shall not summon any person to the Senate except upon a further like direction by His Majesty the King on the like recommendation to represent one of the four divisions until such division is represented by twenty-four senators and no more:

(v) The number of senators shall not at any time exceed one hundred and four:

(vi) The representation in the Senate to which by section one hundred and forty-seven of the British North America Act, 1867, Newfoundland would be entitled, in case of its admission to the Union is increased from four to six members, and in case of the admission of Newfoundland into the Union, notwithstanding anything in the said act or in this act, the normal number of senators shall be one hundred and two, and their maximum number one hundred and ten:

(vii) Nothing herein contained shall affect the powers of the Canadian Parliament under the British North America Act, 1886.

(2) Paragraphs (i) to (vi) inclusive of subsection (1) of this section shall not take effect before the termination of the now existing Canadian Parliament.

2. The British North America Act, 1867, is amended by adding thereto the following section immediately after section fifty-one of the said act:

51A. Notwithstanding anything in this act, a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.

3. This act may be cited as the British North America Act, 1915; and the British North America Acts, 1867 to 1886, and this act may be cited together as the British North America Acts, 1867 to 1915.

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